Neutral Citation Number: [2024] EWHC 1723 (Ch)

Case No: BL-2021-MAN-000070

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 5 July 2024

Before :

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) EDEL MARIE MAGEE **(2) SIOBHAN MARY FERGUSON** **(3) CIARA MELANIE PRYCE** **(4) DONNA MARIAN POWELL** **(AS TRUSTEES OF THE FITZPATRICK FAMILY DISCRETIONARY SETTLEMENT)**	**Claimant**
- and -	
(1) JOHN WADE CROCKER **(2) PEDHAM PLACE GOLF CLUB LIMITED**	**Defendants**
-and-	
CAMELOT TRUST CORPORATION LIMITED	**Third Party**
-and-	
MATTHEW JOHN FITZPATRICK	**Fourth Party**

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Giles Maynard-Connor KC and **Amie Boothman** (instructed by **JMW Solicitors LLP**) for the **Claimants** and **Fourth Party**
Mohammed Zaman KC and **Alexander Heylin** (instructed by **Penningtons Manches Cooper LLP**) for the **First Defendant**

Hearing dates: 23-26, 29-30 April, and 1-3, 7-10 May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

HHJ CAWSON KC:

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INTRODUCTION

1. The present proceedings were commenced on 29 June 2021 by the Claimants ("**the Fitzpatrick Trustees**"), the trustees of the Fitzpatrick Family Discretionary Settlement ("**the FFDS**") and the daughters of the settlor of the FFDS, the Fourth Party, Matthew John ("**Sean**") Fitzpatrick ("**Mr Fitzpatrick**"). By the proceedings, the Fitzpatrick Trustees seek declarations and consequential relief concerning the validity of a transfer in 2014 of shares in the Second Defendant, Pedham Place Golf Centre Limited ("**the Company**") to the FFDS by the Third Party, Camelot Trust Corporation Limited ("**Camelot**"), as trustee of the Nisma Settlement ("**the 2014 Transfer**"), and as to the entitlement of the Fitzpatrick Trustees to rely upon the terms of a Shareholders' Agreement dated 24 May 2010 made between the First Defendant, John Wade Crocker ("**Mr Crocker**") (1) and Camelot (2) ("**the 2010 SHA**").

2. By his Defence, Counterclaim and Part 20 Claim, Mr Crocker denies that the Fitzpatrick Trustees are entitled to the declarations that they seek. Mr Crocker seeks his own declaratory relief to the effect that: the 2010 SHA was terminated in consequence of the 2014 Transfer; the 2014 Transfer was in breach of the Articles of Association of the Company introduced at the same time as the 2010 SHA ("**the 2010 Articles**"); and that

the 2014 Transfer, i.e. any consent of Mr Crocker to it, was procured by the fraudulent misrepresentations made by Mr Fitzpatrick, as well as being in breach of the 2010 SHA and the 2010 Articles.

3. I agree with the analysis suggested on behalf of Mr Crocker that whilst the present proceedings raise a significant number of issues, the case can be crystallised into two overarching questions or issues:

    i) Was there a fraud upon Mr Crocker by Mr Fitzpatrick depriving Mr Crocker of his pre-emption rights under the 2010 Articles at the time of the transfer of shares from the Nisma Settlement to the FFDS purported to have been effected by the 2014 Transfer by Mr Fitzpatrick fraudulently misrepresenting that he was the settlor of the Nisma Settlement and/or that this was his offshore family trust?

    ii) Whether the 2010 SHA was and is binding between (1) the Fitzpatrick Trustees and (2) Mr Crocker, even though:

        a) The 2010 SHA provides for termination upon share transfer;

        b) The Fitzpatrick Trustees are not parties to the 2010 SHA?

4. Giles Maynard-Connor KC and Amie Boothman appear on behalf of the Fitzpatrick Trustees and Mr Fitzpatrick. Mohammed Zaman KC and Alex Heylin appear on behalf of Mr Crocker. I am grateful to them for their written and oral submissions and assistance during the course of the trial.

5. Neither the Company nor Camelot has played any active in the proceedings. This follows from the fact that the real dispute is as between the Fitzpatrick Trustees and Mr Fitzpatrick ("**the Fitzpatrick Parties**") on the one hand, and Mr Crocker on the other hand.

KEY INDIVIDUALS AND ENTITIES AND DEFINITIONS

6. The key individuals and entities involved in the present dispute are as follows:

NAME	DESCRIPTION
Parties	
The Claimants	
Edel Marie Magee, Siobhan Mary Ferguson, Ciara Melanie Pryce and Donna Marian Powell ("**the Fitzpatrick Trustees**")	The Claimants, and the trustees and beneficiaries, of the Fitzpatrick Family Discretionary Settlement ("**the FFDS**"), having previously been identified as beneficiaries of the Nisma Settlement. Daughters of Mr Fitzpatrick and his wife, Olivia (nee Murray), who is also a beneficiary of the FFDS (and previously identified as beneficiary of the Nisma Settlement). Donna Powell ("**Mrs Powell**") was appointed a director of the Company on 23 January 2015 (having been an observer on the board with Mrs Boyes as from June

	2012), and she was registered as a member thereof (on behalf of herself and the other Fitzpatrick Trustees) on 3 April 2020. .
The Defendants	
The First Defendant - John Wade Crocker (**"Mr Crocker"**)	Mr Crocker is the freeholder of Pedham Place Farm, Farningham, Dartford, Kent, DA4 0JW ("**Pedham Place Farm**"). Mr Crocker is a director of the Company, having been appointed on 15 February 1994. He was majority shareholder until 2010 when he became a 50% shareholder together with Camelot. He was also the Company Secretary of the Company from 17 January 1995 to 21 December 2001.
The Second Defendant - Pedham Place Golf Centre Limited **('the Company')**	A Company incorporated on 31 January 1994 (formerly named Orientor Limited) and acquired *"off the shelf"* for the purposes of operating the golf course at Pedham Place Farm.
Third Party	
Camelot Trust Corporation Limited **("Camelot")**	A company incorporated in the Republic of Liberia and dissolved by the Liberia Corporate Registry on 1 September 2019. Trustee of the Nisma Settlement having replaced Cameo Trust Corporation ("**Cameo**") as such on 11 August 1997.
Fourth Party	
Matthew John ("Sean") Fitzpatrick (**"Mr Fitzpatrick"**)	A businessman involved, through the VGC group of companies (including historically VG Clements Contractors Limited and VGC), in construction and civil engineering. A director of the Company, having been appointed on 19 December 1994. It is his case that he was the UK representative, and then administrator/controller of, the Nisma Settlement. He is the settlor of the Fitzpatrick Trust, married to Olivia Fitzpatrick and the father of the Fitzpatrick Trustees.
Witnesses (other than parties)	
Raymond Willim Preedy ("**Mr Preedy**")	An accountant with RE Jones & Co (long since retired). Witness for the Fitzpatrick Parties.
John Frederick Fortune ("**Mr Fortune**")	A director (and former shareholder) of the Company, first appointed as a director on 20 July 1994. He is also the Company Secretary (appointed 21 December 2001). Mr Fortune was a golf architect initially engaged to advise and assist on planning applications for a golf course at Pedham Place Farm. He was a minority shareholder in the Company until

	19 February 2010 when he transferred his shares to Camelot. Witness for Mr Crocker.
Emma Rachel Boyes ("**Mrs Boyes**")	A daughter of Mr Crocker and a director of the Company, appointed on 23 March 2015, having been an observer on the board together with Mrs Powell from June 2012. Witness for Mr Crocker.
Others	
Abbots Chartered Certified Accountants ("**Abbots**")	An accountancy firm that acted for Mr Fitzpatrick and Cameo / Camelot.
Chris Ashby	Owner of Capricorn Farm, neighbouring Pedham Place Farm. On Mr Crocker's case he was the introducer of Mr Crocker to Mr Fitzpatrick and Mr Keaney.
BBM Management Services Limited ("**BBM**")	An Isle of Man based services company.
Chris Bateson ("**Mr Bateson**")	A director of BBM, Cameo, Camelot and Everford Consultants Limited ("**Everford**").
Ian Bertram ("**Mr Bertram**")	Settlor of the Nisma Settlement under a Deed of Settlement dated 16 November 1992 ("**the 1992 Nisma Deed**") that established, and appointed Cameo as trustee of the Nisma Settlement.
Jonathan Van Der Borgh	An accountant. Director and Company Secretary of the Company from 15.02.94 to 17.01.95.
Nicholas Van Der Borgh	Brother to Jonathan Van Der Borgh, and a solicitor at Courtenay Van Der Borgh Shah, Solicitors.
Matthew ("Matt") Boyes ("**Mr Boyes**")	Husband of Mrs Boyes who has provided advice to Mr Crocker. Director (non-voting) of the Company between 19 March 2020 and 17 September 2020.
Alan Bracher ("**Mr Bracher**")	A solicitor and partner in Bracher Rawlins LLP.
Bracher Rawlins LLP ("**Bracher Rawlins**")	A solicitors' firm engaged in relation to the 2010 re-structure of the Company.
Brasted Farming Company Limited ("**Brasted**")	A farming company incorporated on 7 January 1974 (company no: 01155185) belonging to Mr Crocker (and, on Mr Crocker's case, Ronald Crocker before him).
Johnathan Callister ("**Mr Callister**")	A director of Pentland Golf Limited.
Cameo Trust Corporation ("**Cameo**")	A company incorporated in the Republic of Liberia. Original trustee of the Nisma Settlement.
Henry Church ("**Mr Church**")	A Senior Director at CBRE UK.
Steve Coventry ("**Mr Coventry**")	An accountant and partner at Abbots, and also at some point a consultant at BBM, who died on 22 May 2019. Accountant to

	Mr Fitzpatrick, and his companies. He also acted for Mr Murray.
Martyn Crawley ("**Mr Crawley**")	A consultant specialising in capital tax planning, specifically for farming businesses with land and property, at Chaverys Limited, a firm of chartered accountants. An adviser to Mr Crocker.
Ronald Crocker	Father of Mr (John) Crocker. A director of the Company from 20 July 1994 until 23 February 2016, and a shareholder in the Company until he disposed of his shares to Camelot on 25 November 1997. Died in October 2016.
Rupert Jermyn	Son-in-law of Mr Crocker; married to his other daughter, Gail Jermyn (nee Crocker)
Everford Consultants Limited ("**Everford**")	Hong Kong based company of which Mr Bateson was a director.
Maud Lisbeth Fortune	John Fortune's wife and former minority shareholder of the Company. Transferred her shares to Camelot at the same time as Mr Fortune.
Bartholomew ("Bart") Keaney ("**Mr Keaney**")	Mr Fitzpatrick's business partner through his involvement in VG Clements (Contractors) Limited and otherwise. A director of the Company from 24 May 2010 to 1 November 2010.
RE Jones & Co, Chartered Accountants	The Company's accountants.
Desmond Murray ("**Mr Murray"**)	Mr Fitzpatrick's brother-in-law (brother of Olivia Fitzpatrick), who died on 7 August 2009. It is the Fitzpatrick Parties' case that Mr Murray was a settlor of funds and assets in the Nisma Settlement, which were invested in the Company by way of share capital in order to finance the Company, and that Mr Murray was treated as *"true settlor"* of the Nisma Settlement by Cameo and, subsequently, Camelot, as trustees hereof.
Pentland Golf Ltd	An independently owned company (now called Cave Hotels UK Ltd) engaged to manage the golf club at Pedham Place Farm since 2006.
Mark Smith	An RICS valuer and founder of Smith Leisure, chartered surveyors and golf property specialists.
JMW Solicitors LLP ("**JMW**")	Solicitors acting for the Fitzpatrick Parties.
Penningtons Manches Cooper LLP ("**Penningtons**")	Solicitors acting for Mr Crocker since 8 September 2021.
VG Clements (Contractors) Limited	Incorporated on 1 March 1960 (company no: 00651051). Acquired by Mr Fitzpatrick in 1989.

VGC Special Projects Limited (**'VGC'**)	Incorporated on 15 October 1992 (company no: 02756108), formerly known as VGC Landfill Limited. Dissolved on 12 February 2008.
Warners Law LLP ("**Warners**")	Solicitors acting for Mr Crocker prior to 8 September 2021.
Worsdell & Vinter Solicitors	Solicitors firm engaged to act for the Nisma Settlement.

BACKGROUND

7. Mr Crocker is the owner of the freehold of approximately 300 acres of land at Pedham Place Farm, having owned the freehold since the 1970s.

8. On 5 January 1990, Brasted (Mr Crocker's farming company) applied for planning permission for a 27-hole golf course on Mr Crocker's land at Pedham Place Farm. Outline planning permission was granted on 6 June 1990. The minutes of a meeting on 25 August 1992 attended by Mr Crocker and Mr Fortune, the latter in his capacity as golf course architect, refer to it being: "*Accepted that spoil would need to be brought onto site to form bunds"*. This was prior to there having been any contact between Mr Crocker and Mr Fitzpatrick.

9. By the early 1990s, Mr Fitzpatrick and Mr Keaney, who Mr Fitzpatrick describes as his *"business partner"*, were running and operating the company known as VG Clements (Contractors) Limited, a construction company which was operating as a tier 2 contractor on large building and civil engineering contracts in the South East of England, including the M25 around London. Although described by Mr Fitzpatrick as his business partner, Mr Keaney held no shares in this company, and was not formally appointed as a director. During the course of his cross examination, Mr Fitzpatrick accepted, with some hesitation, that prior to Mr Keaney being appointed as a director in 2010, he had been bankrupt and/or subject to a period of disqualification as a director. Mr Fitzpatrick described Mr Keaney's role in this and other companies as being more concerned with sales than management, which Mr Fitzpatrick attended to. Further, Mr Fitzpatrick referred to holding 50% of his shares beneficially for Mr Keaney.

10. It is the Fitzpatrick Parties' case, based on the evidence of Mr Fitzpatrick, that, at about this time, Mr Fitzpatrick became aware from his brother-in-law, Mr Murray, of an opportunity for tipping the material excavated from motorway construction at a farm near the M25. This farm was owned by Chris Ashby and was situated next to Pedham Place Farm. It is said that Messrs Fitzpatrick and Keaney had a number of meetings with Chris Ashby about tipping material on his farm but that no agreement was concluded.

11. So far as Mr Murray is concerned, it is relevant to note that, at this time and until he moved to Australia prior to his death in August 2009, Mr Murray lived in Jakarta, Indonesia, where he was a gas and oil specialist. It was Mr Fitzpatrick's evidence that he visited the UK from time to time, and had business contacts in the UK.

12. It is further the Fitzpatrick Parties' case that in or about late 1992/early 1993, Mr Murray informed Messrs Fitzpatrick and Keaney that Pedham Place Farm had been granted planning permission for the construction of a parkland golf course. It was Mr

Fitzpatrick's evidence that he and Mr Keaney were aware of a number of golf course developments being constructed using landfill to create golf *"links"* style features and that they thought that it might be possible for the planning permission at Pedham Place Farm to be amended to provide for the construction of a links style golf course. The advantage of this was that the undulating landscape of a links style golf course would create a need for significant earthworks, and is said that Mr Fitzpatrick and Mr Keaney recognised that this could be achieved by tipping the material which was being excavated from the M25 and other construction projects in the area, and that it was perceived that other contractors would pay to tip their material at Pedham Place Farm, which would provide additional funding for the construction of the golf course.

13. It was Mr Fitzpatrick's evidence that, as a result, during early 1993 he approached Mr Crocker and personally proposed the idea to him. It is Mr Fitzpatrick's evidence that Mr Crocker was very keen and that following further meetings, during which Mr Crocker introduced Mr Fortune as the golf course architect who was then working on the proposed development at Pedham Place Farm, new plans for a links style golf course were drawn up and a revised planning permission application was submitted.

14. As to the introduction alleged to have been effected by Mr Murray to the Pedham Place Farm opportunity, and the planning permission opportunity, it is Mr Fitzpatrick's evidence that he negotiated the payment of a finder's fee to Mr Murray of an amount equal to 10% of the turnover received from tipping.

15. It is Mr Crocker's evidence that he entered into discussions with Mr Fitzpatrick and Mr Keaney for tipping material onto Crocker's land at Pedham Place Farm having been introduced to the latter by his neighbour, Chris Ashby. Under cross examination, Mr Crocker disputed that it was Mr Fitzpatrick or Mr Keaney who had come up with the idea of a links style course and suggested that this was something that was already in train by the time that Mr Fitzpatrick and Mr Keaney came on the scene.

16. Whatever the precise timing and detail as to the involvement of Mr Fitzpatrick and Mr Keaney, final details regarding the layout of the golf course and a golf driving range were submitted on 17 February 1993 and 18 March 1993, and approval of reserved matters was granted for planning purposes on 29 June 1993. Construction of the golf course, and tipping on the land at Pedham Place Farm, began in late 1993 or early 1994.

17. An existing company owned by Messrs Fitzpatrick and Keaney, namely VGC, was renamed on 30 July 1993 for the purpose of being used to carry out the golf course construction and landscaping work.

18. In stages between 1997 and 2009, a 9-hole course was opened, followed by a driving range and an 18-hole course.

19. The Company was incorporated on 31 January 1994 as Orientor Limited, and was acquired *"off the shelf"* for the purposes of operating the proposed golf course. On 15 February 1994, Mr Crocker and Jonathan Van Der Borgh were appointed as directors, and Jonathan Van Der Borgh was appointed Company Secretary. The Registered Office was changed to Pedham Place Farm, and the authorised share capital was increased to £1,000,000. The Company's name was changed to its present name on 8 March 1994. Pursuant to a resolution dated 20 July 1994, 50,000 Ordinary shares were allotted as to 40,000 to Mr Crocker, 5,000 to Ronald Crocker, and 5,000 to Mr Fortune. Further, at

the same time, Ronald Crocker and Mr Fortune were also appointed as directors of the Company.

20. It is Mr Fitzpatrick's evidence that his own involvement with regard to a shareholding in the Company goes back to late 1994 when Ronald Crocker asked him whether he would be willing to invest in the Company in exchange for shares. Mr Fitzpatrick says that he declined as he could not personally afford to invest at that time, and neither could VGC. However, Mr Fitzpatrick says that he informed Ronald Crocker that he knew of somebody who might be willing to invest, and that he subsequently approached Mr Murray to this end. He says that his discussions with Mr Murray related to the possibility of Mr Murray investing in the Company in exchange for a shareholding. Mr Fitzpatrick says that Mr Murray agreed to invest but told Mr Fitzpatrick that he wanted to structure any investment through an offshore trust which he would set up.

21. Mr Fitzpatrick says that he informed Ronald Crocker and Mr Crocker that he had secured investment for the Company through his brother-in-law, Mr Murray, and that Mr Murray would be investing through an offshore trust. It is Mr Fitzpatrick's evidence that there was a delay in Mr Murray establishing his trust and so, as the Company required an urgent cash injection, VGC agreed to provide the initial cash required (£25,000) in return for shares, Mr Fitzpatrick and Mr Murray having agreed that VGC would be later reimbursed by Mr Murray's trust once set up. Mr Fitzpatrick says that Mr Crocker and Ronald Crocker were told of this arrangement by Mr Fitzpatrick at the time.

22. Mr Crocker disputes this version of events and denies that there was ever any suggestion made to him of Mr Murray investing in the Company, whether by way of the subscription of shares or otherwise, and that although Mr Fitzpatrick subsequently, in early 1995 at a board meeting on 28 February 1995, raised the transfer of shares to an offshore trust, Mr Crocker was led to believe that the trust in question was one established as Mr Fitzpatrick's and Mr Keaney's family trust as referred to below.

23. Mr Crocker contends that his version of events is supported by the documents, and by the absence of any reference to Mr Murray in any Company documentation. Mr Crocker accepts that Mr Murray was mentioned to him on a number of occasions by Mr Fitzpatrick, but he says on no more than about five occasions, and his recollection is that Mr Fitzpatrick referred to Mr Murray as being the *"administrator"* of the relevant trust and not the settlor. Mr Crocker accepts that Mr Fitzpatrick informed him that Mr Murray had died at some stage after Mr Murray died in August 2009, although Mr Crocker was unspecific as to when. Mr Crocker says that he only saw Mr Murray at Pedham Place Farm on one occasion in about 1996, when Mr Murray brushed past him without there being any communication between the two of them.

24. Mr Crocker refers to the tipping as having initially been undertaken through VG Clements (Contractors) Limited, and to it having been minuted at a board meeting of the Company on 28 March 1994 that:

> *"Clements had indicated that they would be prepared to discuss an investment of an equivalent of £150,000 in the form of construction costs and this will be discussed with them at the next opportunity"*

25. Further, Mr Crocker refers to the minutes of a meeting of the board of the Company on 20 July 1994 attended by Mr Crocker, Johnathan Van der Borgh, Ronald Crocker and Mr Fortune in which the following is noted under the heading *"VGC SPECIAL PROJECTS LIMITED"*:

> *"A letter from Steve Coventry of Abbots (Certified Accountants) dated 15 July 1994 was tabled (copy attached) confirming his discussion with Jonathan van der Borgh in connection with the proposed subscription by [VGC] for 25% of the ordinary issued share capital of the company or a consideration of £300,000. The meeting confirmed the details set out in the letter, subject to the points contained therein."*

26. The letter dated 15 July 1994 referred to in this minute has not been produced by any of the parties. On behalf of Mr Crocker, it is submitted that adverse inferences should be drawn from its non production.

27. There was a further board meeting of the Company on 16 September 1994 attended by the same individuals as the meeting on 20 July 1994. The minutes thereof, under the heading *"FINANCE"*, record:

> *"A schedule showing the short term cash requirements of the company was tabled… This would necessitate additional short term finance of up to £100,000. VGC Special Projects Limited had been informed of the position and had indicated that they would assist by injecting some cash (subject to all agreements being in place).*
>
> *John Crocker confirmed that he had applied for a personal loan from AMC and that when this was available he would advance £40,000."*

28. In October 1994, VGC advanced £25,000 to the Company as payment for shares therein.

29. On 19 December 1994:

    i) Mr Crocker granted a lease to the Company over Pedham Place Farm for a term of 35 years;

    ii) A tipping agreement was entered into between (1) the Company (2) VGC; (3) VG Clements Contractors Limited (as guarantor) and (4) Mr Crocker ("**the Tipping Agreement**") relating to the depositing of inert material at Pedham Place Farm;

    iii) A share subscription agreement was entered into between (1) Mr Crocker, Ronald Crocker and Mr Fortune, (2) VGC and (3) the Company ("**the 1994 SSA**");

    iv) Mr Fitzpatrick was appointed as a director of the Company; and

    v) 1,138 Ordinary shares were allotted, albeit in error to Mr Fitzpatrick, for a consideration of £25,000 (i.e. £21.96 per share). The shares in question were subsequently re-registered in the name of VGC. No further shares were ever allotted to VGC.

30. The 1994 SSA provided, amongst other things, for:

i) The adoption of new Articles of Association of the Company ("**the 1994 Articles**") that included restrictions on the transfer of shares and pre-emption rights, but providing, at Art. 7.2.4, an exception with regard to the pre-emption rights for so long as VGC should be a shareholder in respect of any transfer by VGC to Mr Fitzpatrick or to a qualifying relative or qualifying trustee of Mr Fitzpatrick;

ii) The appointment of Mr Fitzpatrick as a director of the Company;

iii) VGC to be required to subscribe for 16,668 shares (at £21.96 per share, i.e. £366,029.28 in total) by 30 September 1996, which would take VGC to a 25% shareholding in the Company (clauses 3.1 and 3.2);

iv) VGC to be able to subscribe for shares in monies, or monies worth (e.g. the provision of services or goods to the Company) (clause 3.3);

v) A list of monies due from the Company to VGC comprising:

a) £135,000 *"in respect of additional works outside the terms of the Tipping Agreement"*; and

b) £25,000 cash received.

31. On 17 January 1995, Jonathan Van Der Borgh resigned as a director, and as Company Secretary of the Company.

32. It is Mr Fitzpatrick's evidence that Mr Murray travelled to England from Jakarta to view Pedham Place Farm and to meet Mr Crocker in early 1995. He says that he showed Mr Murray around the site and introduced him to Mr Crocker. He further says that during a meeting at Mr Crocker's house, Mr Murray and Mr Fitzpatrick discussed Mr Murray's investment in the Company, including that he was investing through his family trust. As will be apparent from the above, this version of events is disputed by Mr Crocker.

33. It is Mr Fitzpatrick's evidence that he introduced Mr Murray to Mr Coventry at Abbots. By a letter dated 20 February 1995, and following a telephone conversation with Mr Coventry, Mr Murray wrote to Mr Coventry asking him to accept the letter as a written instruction for Mr Coventry to acquire the Nisma Settlement for him, i.e. the settlement that had been established by Mr Bertram (as settlor) by the 1992 Nisma Deed. The 1992 Nisma Deed, named a number of charitable beneficiaries in the Third Schedule thereto, but the definition of *"Beneficiaries"* in clause 1(b)(ii) extended to such other persons as were added to the class of Beneficiaries in the exercise of the powers conferred on the Trustees by clause 11 thereof.

34. The letter dated 20 February 1995 went on to refer to Mr Coventry having received the sum of £26,000, and to ask him to arrange for £25,000 to be paid to VGC *"to reimburse them for expenditure on our behalf."*

35. The Fitzpatrick Parties have referred to Mr Murray, following his acquisition of the Nisma Settlement, as being the *"true settlor"* thereof[1]. This concept, and suggestion that anybody apart from Mr Bertram was the settlor of the Nisma settlement is challenged on behalf of Mr Crocker. The evidence is to the effect that Mr Bertram purported to establish settlements by documents such as the 1992 Nisma Deed as *"off-the-shelf"* settlements to be acquired by clients, as I understand it, on the basis that the trustee of the settlement was a company controlled by him and/or by Mr Bateson that would, in practice, act on (or have due regard at least to) the wishes of the client *"acquiring"* the settlement. On this basis, if Mr Murray *"acquired"* the Nisma Settlement, although the relevant trustee (Cameo, and subsequently Camelot) had the ultimate discretion regarding the addition of *"Beneficiaries"* and more generally, it would, in practice, act on Mr Murray's wishes. It should be noted that under clause 11 of the 1992 Nisma Deed, *"Beneficiaries"* were required to be formally appointed by deed by the trustee. There is no evidence of any such deed ever having been executed.

36. The minutes of a board meeting of the Company on 28 February 1995, attended by Mr Crocker, Mr Fortune and Mr Fitzpatrick record the following:

> *"**2. VGC – 25,000 shares***
>
> *SF formally requested that he might transfer 25,000 shares into a Jersey Trust – Nisma. This was subject to a Deed of Adherence.*
>
> *The Deed would ensure compliance with the existing conditions by the Jersey Trust. JF to contact Nicholas van den Borgh to draw up the Deed..."*

37. The reference to 25,000 shares was plainly an erroneous reference to the consideration for the shares in question (the 1,138 Ordinary shares that had been allotted to Mr Fitzpatrick). In fact, a Deed of Adherence was never entered into. As I have already mentioned, it is Mr Crocker's case that he understood that Mr Fitzpatrick was intending to cause the shares to be paid into a family trust established for the benefit of Mr Fitzpatrick's and Mr Keaney's families having been led to so understand by Mr Fitzpatrick. In response to a Request for Further Information, Mr Crocker further explained this as follows:

> *"Mr Fitzpatrick had said that he wanted to put his shares offshore. As Mr Fitzpatrick was in partnership with Mr Keaney and the shares were being transferred from VGC to the Nisma Settlement, Mr Crocker understood that the trust was for Mr Keaney's benefit as well as Mr Fitzpatrick's as they were partners."*

38. It is Mr Fitzpatrick's evidence, and the Fitzpatrick Parties' case, that the minute reflected that Mr Murray's trust, the Nisma Settlement, had reimbursed VGC the £25,000 that had been paid by VGC for the 1,138 Ordinary shares in the Company, hence to the shares being transferred to *"Nisma"*.

39. The 1994 SSA had provided for VGC to subscribe just over £366,000 for a 25% shareholding, although on the Fitzpatrick Parties' case Mr Murray was brought in to

[1] In a letter dated 18 May 2009 to Allied Irish Bank, Mr Coventry referred to Mr Murray as the *"effective settlor"* of the Nisma Settlement.

provide the relevant funding because neither Mr Fitzpatrick nor VGC could afford to provide it. Many years later, by a letter dated 28 October 2005, RE Jones & Co provided a reconciliation showing how the £366,000 was, in fact, provided by way of cash and work done by VGC itself. This has been tabulated by Mr Zaman KC and Mr Heylin as follows:

	Cash	**Work done**
October 1994	£25,000	
To y/e July 1995		£135,000
March 1996	£20,000	
April 1996	£17,300	
May 1996	£17,500	
June 1996	£17,300	
June 1996	£20,000	
July 1996	£17,300	
To y/e July 1996		£10,000
August 1996	£17,300	
September 1996	£17,300	
September 1996	£17,300	
October 1996	£17,300	
November 1996	£17,300	
TOTAL	£220,900	£145,000

40. I note that the minutes of a board meeting dated 15 December 1995 refer to Mr Fitzpatrick having confirmed: *"that his extra financial input of £206,000 will be made by equal monthly contributions January to December 1996"* [my emphasis], with the minutes going on to say that the cash flow would be amended to reflect this. The minute further went on to say that once the revised cash flows were prepared: *"meetings should be arranged with the proposed funding sources."* The reference to equal monthly contributions ties in with the regular monthly payments identified in RE Jones & Co's reconciliation.

41. Mr Zaman KC and Mr Heylin point out that the Company's financial statements for the year ended 31 July 1996 (signed by Mr Fitzpatrick) show the payments paid (by VGC) up to that date as share capital, there being included a *"calls in arrears now paid £119,400"* figure, this latter amount being the total of cash paid and work done in that year by VGC. However, the point is made by Mr Maynard-Connor KC that the fact that there were errors so far as these accounts were concerned, and with VGC being treated as a shareholder, was recognised at the board meeting on 12 May 1997 referred to below at which it is said that some mention was made of Mr Murray.

42. I put the point to Mr Fitzpatrick at the conclusion of his evidence that Mr Murray, through the Nisma Settlement, had been supposed to be providing the relevant funding, but that RE Jones & Co's letter dated 28 October 2005 suggested differently. In response, he explained that it was a question of cash flow, and that whilst VGC could provide the funds in the short term, it was not in a position to make a long-term investment and so the monies that VGC did provide were treated (as between VGC and the Nisma Settlement) as a loan due to be repaid by the Nisma Settlement.

43. As to the repayment of any such loan, reliance is placed by the Fitzpatrick Parties on a cheque dated 24 February 1997 drawn on a BBM account with Bank of Scotland (Isle of Man) Limited and made payable to VGC in an amount of £196,000. However, there is no real evidence as to how the balance of the 366,000 (less the £25,000) was repaid. As to the £196,000, the relevant cheque was drawn shortly after the Bank of Ireland had, on 7 February 1997, written to Mr Fitzpatrick at VGC enclosing an offer letter addressed to the Trustees of the Nisma Settlement in respect of an advance in favour of the Nisma Settlement in an amount of £200,000 *"by way of Bridging Term"*, the offer letter providing for repayment of this Bridging Loan facility in full within two months from the date of drawdown. The offer letter referred to the purpose of the advances as being: *"To provide a bed & breakfast facility for VGC Special Projects"*. No explanation was provided as to what this was all about.

44. On 12 May 1997, a board meeting took place attended by Mr Crocker, Mr Fortune, Mr Fitzpatrick and Ronald Crocker. Mr Keaney, Mr Coventry and Mr Preedy (from the Company's Accountants, RE Jones & Co) were also present. Amongst other things, the shareholdings in the Company were discussed in the light of the fact that the Company's annual returns and statutory books still recorded VGC as a shareholder. A further issue identified was that the Nisma Settlement was not a party to the 1994 SSA. The minutes of this meeting recorded:

> *"We are advised that the shares in the name of VGC Special Projects should be in the name of Nisma Settlement – no mention in share agreement, what action?"*

45. Mr Preedy made handwritten notes of the meeting on 12 May 1997. These made reference to *"Nisma Settlement"* followed by *"(Desmond Murray)"*, with an arrow up from the words *"Statutory Books"*. Understandably, some 27 years after the event, Mr Preedy was unable to shed any real light on how he had come to write this, or as to what, if anything, might have been said about Mr Murray at this meeting.

46. On 11 August 1997, by a Deed of Retirement and Appointment of Trustees, Camelot was appointed as trustee of the Nisma Settlement in place of Cameo. There has been produced a letter dated the same date, 11 August 1997, from Mr Bertram to Camelot in the form of a letter of wishes in blank stating:

> *" In connection with the NISMA SETTLEMENT … We write to express the wish that you consider his spouses or heirs or assigns when appointing either income or capital of the settlement…"*

47. On 10 September 1997, Mr Coventry wrote to Mr Fitzpatrick under the heading: *"Desmond's Settlement – "Nisma"."* In this letter, Mr Coventry stated that although he had not received written instructions from Mr Murray, he had a file note recording a telephone conversation with Mr Murray that confirmed an instruction from Mr Murray that Abbots should take instructions from Mr Fitzpatrick in Mr Murray's absence as Mr Murray's "*UK appointed representative*."

48. On 13 November 1997, VGC transferred its 1,138 shares in the Company to *"Nisma Settlement"*

49. On 18 November 1997, Nisma Settlement was allotted 15,530 shares in the Company (at £21.96 per share), taking its total shareholding in the Company to 16,668 shares (being 25% of the issued share capital).

50. On 25 November 1997, Ronald Crocker transferred his 5,000 shares in the Company to the Nisma Settlement for £25,000. It is Mr Fitzpatrick's evidence that he was approached by Ronald Crocker to purchase the shares, and declined to do so suggesting that Mr Murray may be willing to purchase them. He says that he then did approach Mr Murray, which led to the transfer to Nisma for a consideration of £25,000.

51. Eventually, on 31 July 1998, a new shareholders' agreement was entered into between (1) Mr Crocker; (2) Mr Fortune; (3) Camelot (as trustee of the Nisma Settlement), and (4) the Company ("**the 1998 SHA**"). The 1998 SHA was signed on behalf of Camelot by Mr Bateson. Amongst other things, it imposed restrictions on share transfers (clause 6) and required shareholder approval for a range of restricted activities (clause 4). Clause 3.1 provided that Mr Crocker and Ronald Crocker were appointed as directors by Mr Crocker, Mr Fitzpatrick was appointed as a director by the Nisma Settlement, and Mr Fortune was appointed jointly by Mr Crocker and the Nisma Settlement. There was no change to the 1994 Articles at this stage.

52. Worsdell & Vinter Solicitors acted for the Nisma Settlement in relation to the 1998 SHA. On 5 August 1998, they wrote to Mr Fitzpatrick enquiring as to whether they should send their account to him as the Nisma Settlement's UK representative, or directly to Mr Bateson.

53. The minutes of a board meeting of the Company dated 11 May 1998 record:

> *"4…. b) The £50,000 required to implement the construction of the course to be put up by the shareholders in proportion to their shareholding against the issue of further shares*
>
> *J Crocker £30,000 (60%)*
>
> *S Fitzpatrick £16,250 (32.5%)*
>
> *J Fortune £3,750 (7.5%)"*

Mr Crocker takes the point that the minute draws no distinction between Mr Fitzpatrick and the Nisma Settlement/Camelot.

54. On 27 March 2000, further shares were allotted in the Company, as to 1,942 to the Nisma Settlement, 1,215 to Mr Crocker and 837 to Mr Fortune.

55. On 15 October 2002, a payment of £104,217 was made by VGC to the Company, which the Company recorded as a loan from the Nisma Settlement. A further £350,000 was paid by VGC to the Nisma Settlement on 3 February 2003. It is Mr Fitzpatrick's evidence that these payments represented payments made by VGC to the Nisma Settlement as payment of the finder's fee that had been agreed between Mr Fitzpatrick and Mr Murray in respect of the introduction of Pedham Place Farm and the golf club planning opportunity referred to above.

56. On 14 April 2003, Mr Bateson wrote to Mr Fitzpatrick enquiring about the origins of the increased balance on the Nisma Settlement's account. By letter dated 7 May 2003, Mr Murray responded to this enquiry, stating that Mr Fitzpatrick had forwarded the letter dated 14 April 2003 to him. Mr Murray stated: *"The money recently paid into the trust came from [VGC], a UK company. It represented money due to me and/or to the trust, from that company"*, without being any more specific. Mr Murray subsequently, on 16 May 2007, made a *"Declaration"* in which he said that amounts totalling £454,217 (i.e. £104,217 + £350,000) had been: *"paid to me by [VGC] as finder's fees at Pedham Place Golf Centre Ltd. this potential project was identified by me and introduced by me to the directors of [VGC]."*

57. In 2005, HMRC Civil Investigations (Offshore Fraud Projects Group) commenced an inquiry into Mr Fitzpatrick, VGC, and Cole Enterprises Limited, another company in which Mr Fitzpatrick and Mr Keaney were involved. Mr Crocker says that this was something which he was unaware until disclosure in the present proceedings. Amongst other things, HMRC required explanations for the payments made by VGC to and for the benefit of the Nisma Settlement referred to in paragraph 55 above. Correspondence ensued and Abbots and KPMG responded on Mr Fitzpatrick's and VGC's behalf. The response from KPMG was in the form of a letter dated 5 July 2006 that included a fairly detailed factual narrative which referred, amongst other things, to Mr Murray having made the investment of £366,000 in the Company, and to the Company being aware that a third party was making the investment.

58. Amongst the questions raised by HMRC in a letter dated 12 July 2005 were the following:

> *"6.1.2 Is Mr Fitzpatrick or any member of his family a beneficiary of the Nisma or any other settlement".*
>
> *"6.1.3 Has Mr Fitzpatrick ever been told or led to believe that he or any member of his family might, dependent on the exercise of the trustee's discretion, benefit at some future date from the Nisma Settlement, or any other any other settlement?"*
>
> *...*
>
> *6.2.1 Has either Mr Fitzpatrick or any company in which Mr Fitzpatrick is a director made any payments on behalf of the trustees of the Nisma Settlement or conducted any business or transactions on behalf of the trustees of the Nisma Settlement? If so may I have full details?"*

59. By a letter dated 8 September 2005, Abbots responded to the above questions as follows:

> *"6.1.2 No*
>
> *6.1.3 No*
>
> *...*
>
> *6.2.1 Only the £25,000 advanced for the original 1138 shares."*

60. It is Mr Crocker's case that these answers were untrue.

61. On 30 August 2005, Mr Fitzpatrick wrote to the Bank of Ireland requesting the transfer of £98,058.98 from VGC to an account in the name of the Nisma Settlement held at the Bank of Ireland, Croydon. The issue was raised in cross examination of Mr Fitzpatrick that HMRC had enquired as to whether any other payments had been made to the Nisma Settlement apart from those referred to above, requesting a schedule showing the amounts and dates of all payments of fees to Nisma, to which the response had been: *"No other payments were made."* In the light of the payment of this further sum of £98,058.98, Mr Fitzpatrick was asked whether this answer was true. He said that he believed that it was, but he was not able to explain what this latter payment related to.

62. It was on 28 October 2005, whilst the HMRC enquiry was ongoing, that RE Jones & Co. produced their letter dated 28 October 2005 referred to in paragraph 39 above reconciling how the consideration of £366,000 was provided (by payments made and work done by VGC) for a shareholding in the Company.

63. Ultimately, and explanations having been provided to HMRC as to Mr Murray's involvement with the Nisma Settlement and Mr Fitzpatrick's role as the Nisma Settlement's representative, HMRC's Inquiry was closed without any further action being taken. I enquired as to when this was, but no clear answer was provided.

64. Despite the ongoing development of the golf course, for many years there was no permanent clubhouse, only a temporary clubhouse made up of a reception, shop and café housed in portacabins. This was a significant issue for the Company, and there was a desire on the part of all concerned to build a permanent clubhouse building. Amongst other things, it was considered that this would increase golf income whilst also opening up alternative revenue streams including from food, beverages and functions. Discussions took place over a number of years from the early 2000s as to the restructuring of the Club's ownership and the necessary investment required to build the clubhouse. The Nisma Settlement offered to put up its share of the construction costs and was willing to invest up to £500,000, whilst Mr Crocker wanted rent monies owed to him to be taken into account as part of his investment. The negotiations were prolonged. Mr Fitzpatrick negotiated on behalf of the Nisma Settlement, with advice from Mr Coventry. Mr Crocker was advised by, amongst others, Mark Smith, a specialist golf course valuer, and Mr Crawley.

65. Mr Crocker has identified an email that he sent to Mr Crawley on 17 March 2006 in which he said, amongst other things:

> *"I have had meetings with my co-directors at Pedham Place and we do wish to go ahead with the development of the clubhouse next year, subject to Sean and me coming to an agreement on the level of rent and therefore the amount available for distribution to us as investors … My problem is that I need to find a way of keeping the rent stream high to protect the freehold value but at the same time finding a way of increasing the share of dividend to Sean Fitzpatrick to make it worthwhile his investing in the building of the clubhouse … If Sean puts in more money than I do … It would enable Sean to enjoy a higher proportion of dividend distribution."*

Mr Crocker relies upon this email as demonstrating his contemporaneous understanding that he understood his counterparty in the relevant discussions to be Mr Fitzpatrick, and not Mr Murray, hence the reference to Mr Fitzpatrick putting in more money etc..

66. As a result of the negotiations between Mr Crocker and the Nisma Settlement (acting by Mr Fitzpatrick), by mid-2008 an agreement in principle had been reached as to the required further investment in the Company, and for a corporate re-structure involving the sale of shares by then held by Mr Fortune and his wife (Mr Fortune having transferred 2,269 Ordinary shares to his wife on 27 March 2008), and the Nisma Settlement becoming a 50:50 joint venture shareholder with Mr Crocker – see e.g. the aide memoire of a meeting between Ronald Crocker, Mr Crocker and Mr Fitzpatrick held on 19 May 2008, and comments thereupon that have been produced. Mr Coventry prepared Draft Heads of Agreement on 12 December 2008. Bracher Rawlins were instructed to deal with the re-structure and to prepare the necessary documentation including new Articles of Association and a new shareholders agreement. Draft documents were subsequently produced and circulated by Mr Bracher, a first draft of a shareholders' agreement being circulated by Mr Bracher under cover of an email dated 20 January 2009.

67. On behalf of Mr Crocker, reference is made to an email dated 5 December 2008 from Mr Crawley to Mr Coventry in which Mr Crawley said, at one point: *"On the death of either Sean or John, the relevant family will have the right to nominate a successor to hold rights afforded to Sean and John by the agreement."* However, I note that this was said under a header paragraph that read: *"We need to agree the terms whereby Nisma and/or John can realise their interest in [the Company]. My points below apply to the ordinary shares, the preference shares and the loan."*

68. I note an email from Mr Bracher to Mr Crocker and Mr Fitzpatrick dated 24 March 2009 that stated that it was being sent following *"our last meeting"*, and it attached a marked and unmarked copy of a further revised version of the shareholders' agreement. It referred to a point having been raised with regard to a change in the identity of the beneficiaries of the Nisma Settlement, albeit describing this as a *"rather unlikely scenario"*. It went on to say: *"However, paragraph (b) of the new clause 2.3, specifies that there will be no change to the beneficiaries of the Nisma Settlement, other than allowing the class of beneficiaries to extend to "Privileged Relations" of the existing beneficiaries, who I understand to be Sean's brother and, presumably, other members of the Fitzpatrick family."* I note that the meeting from which these latter comments derived took place before when Mr Fitzpatrick now says that Mr Murray made his wishes known so far as the Nisma Settlement is concerned, however I do note that Mr Fitzpatrick was not cross-examined on this email, and thus asked to explain it, and so I must attach limited weight to it. I would have thought that the reference to Sean's brother is a mistaken reference to Mr Murray, his brother-in-law.

69. By mid-2009, Mr Murray had become seriously ill, and he died, on 7 August 2009, in Australia. It is Mr Fitzpatrick's evidence that, in 2009 and prior to his death, Mr Murray informed Mr Fitzpatrick, for the first time, that it was his wish that the beneficiaries of the Nisma Settlement would be his sister, Olivia (Mr Fitzpatrick's wife), and nieces (the Fitzpatrick Trustees). Mr Fitzpatrick says that Mr Murray explained that his wife and daughter were intending on living full time in Australia, and would not want any involvement, or have any interest, in the running of a golf course in England.

70. A number of contemporaneous file notes and memorandum prepared by Mr Coventry have been produced. It is not suggested that they are not genuine and contemporaneous. They were as follows:

i) In a file note dated 1 June 2009, copied to Mr Fitzpatrick, Mr Coventry referred to having been informed by Mr Fitzpatrick that morning that Mr Murray was unwell and that he was concerned to ensure that the administration of the Nisma Settlement continued both during his illness and should the worst happen, the prognosis not being good. The file note refers to Mr Fitzpatrick and Mr Coventry contacting Mr Murray on the telephone in Jakarta to discuss the matter and to it being agreed that:

a) Mr Fitzpatrick would accept the role of joint administrator/controller from that point until Mr Murray's health should recover sufficiently for him to be able to regain sole control;

b) In the event of Mr Murray's death, Mr Fitzpatrick would assume the role of sole administrator/controller;

c) Mr Fitzpatrick would have a further discussion with Mr Murray at an early date so that Mr Fitzpatrick was fully aware of Mr Murray's wishes with regard to the management and disposition of the trust's assets, income etc.;

d) Mr Coventry would advise the trustee (i.e. Camelot) of the agreement reached.

ii) A memorandum dated 1 June 2009 from Mr Coventry to Mr Bateson, copied into Mr Fitzpatrick, referred to the matters agreed as referred to in the file note dated 1 June 2009. However, there was then added, above Mr Fitzpatrick's signature (with Mr Coventry acting as witness), the following:

> *"I Matthew John (Sean) Fitzpatrick agree to accept the role of joint/sole administrator/controller of the trust and undertake to carry out Desmond's wishes with respect to the trust property."*

iii) A memorandum dated 2 June 2009 and headed *"Re: Nisma Settlement"* from Mr Coventry to Mr Fitzpatrick and Mr Keaney. This memorandum included the following, under the heading *"Possible Dissolution of Nisma"*:

> *"The trustees have indicated that they may consider dissolving Nisma. There is a power under the trust deed to transfer any trust property to another trust or trusts for any of the beneficiaries.*
>
> *The funds that were used to constitute the substantial part of the trust came from Mr Murray's commission on the VGC Special Projects contract for tipping at Pedham. My understanding is that Mr Murray would be happy for the trustees to transfer the benefit to his nieces.*

> *Between the two of you, and for the sake of continuing the fairness that has characterised your mutual business affairs for over 30 years, it is considered that it would be fair, if this distribution of trust assets happens, for the benefit to be divided equally between the Keaney and Fitzpatrick 'next generation'."*

iv) A file note dated 15 June 2009, copied into Mr Fitzpatrick, in which Mr Coventry noted that Mr Fitzpatrick had called him to let him know that:

> *"... following the discussion between he, I and Desmond Murray on 1st June he had now had the promised further discussion with Desmond to clarify his wishes regarding trust management and disposition of assets and income."*

71. Having said that he regarded Mr Keaney as his business partner, and someone that he worked closely with in VGC and other entities as referred to above, during the course of his cross examination, Mr Fitzpatrick referred to having negotiated a severance package with him prior to Mr Keaney retiring on 1 June 2009 when, so Mr Fitzpatrick said, *"we had the final meeting with Steve Coventry and we -- as has been recorded we went to lunch afterwards."* If this is right, then Mr Coventry's memorandum dated 2 June 2009 would suggest that the question of some sort of claim by Mr Keaney, on behalf of his family, in respect of the Nisma Settlement, was left open. Shortly after the exchange that I have just mentioned, Mr Fitzpatrick was asked in cross examination as to whether he and Mr Keaney were *"thinking of splitting up trust assets then?"* Mr Fitzpatrick replied: *"As I said, over dinner, and it started off in a flippant manner and then became serious. But Keaney did bring up that the contribution he had made to the tipping and [the Company] and that if my family was benefiting from Nisma that he should benefit from it as well."* Mr Zaman KC then put to Mr Fitzpatrick that it was *"all about the tipping"*. However, Mr Fitzpatrick's response was to the effect that Mr Keaney had already had his share of the profits from the tipping through his interest in VGC (as shareholder).

72. It is Mr Fitzpatrick's evidence that following Mr Murray's death on 7 August 2009, he informed Mr Crocker thereof. Mr Crocker, in his evidence, accepted that he had been told of Mr Murray's death by Mr Fitzpatrick, although the evidence is somewhat unclear as to when this is said to have been.

73. There is, as I have already touched upon, no evidence that Camelot ever signed a declaration pursuant to clause 11(b) of the 1992 Nisma Deed appointing the Fitzpatrick Trustees as beneficiaries of the Nisma Settlement. However, whatever technical points might be capable of being taken on behalf of Mr Crocker in respect of the use and operation of the Nisma Settlement as an *"off-the-shelf"* settlement, the practical reality of the position is, as I see it, that following Mr Murray's death, Camelot would, if requested to do so by Mr Fitzpatrick, have given effect to what Mr Fitzpatrick represented to be the wishes expressed by Mr Murray as to the disposition of the assets contained in the Nisma Settlement in favour of his daughters, the Fitzpatrick Trustees. To that extent, it might fairly be said that following Mr Murray's death, the Nisma Settlement had, whatever Mr Murray's true role and involvement had been, become an offshore Fitzpatrick family settlement even if it had not been already.

74. On behalf of Mr Crocker, reference is made to an email from Mr Bracher to Mr Fitzpatrick and Mr Crocker dated 20 February 2010 in which Mr Bracher referred to his understanding that: *"you have agreed that only £130,000 will be subscribed by each of you for preference shares at this stage, with additional money being subscribed later when agreed"*, and to him also saying *"they show each of you subscribing*" and *"when you wish to inject a further tranche of funds"*. It is said that this shows that even Mr Bracher believed the Nisma Settlement and Mr Fitzpatrick to be synonymous.

75. By May 2010 the formalities of the proposed restructure had been agreed, and at meetings of the Company's board and shareholders on 24 May 2010, or contemporaneously therewith:

i) The Ordinary shares held by Mr Fortune and his wife were transferred to Camelot, as trustee of the Nisma Settlement. It was Mr Fortune's evidence that Mr Fitzpatrick personally paid for these shares by cheque, something that Mr Fitzpatrick disputes;

ii) The Company allotted 11,772 Ordinary shares to Camelot, as trustee of the Nisma Settlement, Camelot subscribing for the same for £340,000 (i.e. £28.88 per share);

iii) The Company allotted 130,000 Preference shares to each of Mr Crocker and Camelot;

iv) New Articles of Association were adopted ("**the 2010 Articles**");

v) Mr Keaney was appointed as a director;

vi) A new shareholders' agreement was entered into between (1) Mr Crocker and (2) Camelot ("**the 2010 SHA**");

vii) For the purposes of clause 3 of the 2010 SHA, which provided for a maximum of three *"JC Directors"* and three *"Nisma Directors"*, and for an equality of votes (three votes each) between the two categories of directors however many directors of each category were appointed, Mr Crocker, Ronald Crocker, and Mr Fortune were confirmed as *"JC Directors"*, and Messrs Fitzpatrick and Keaney were confirmed as *"Nisma Directors"*;

viii) A Deed of Variation to the Lease granted by Mr Crocker on 19 December 1994, and a new Reversionary Lease for a term of 65 years from 1 January 2029 to 31 December 2093, were entered into between (1) Mr Crocker and (2) the Company.

76. It is Mr Fitzpatrick's evidence that as Camelot was to invest substantial sums of money to fund the building of a clubhouse etc., he was, on behalf of the latter, insistent that there should be in place a shareholders' agreement such as the 2010 SHA to regulate the relationship between Mr Crocker and Camelot, as trustee of the Nisma Settlement. Under cross examination, Mr Crocker sought to play down, at least from his own perspective, the importance of the 2010 SHA, albeit acknowledging that Mr Fitzpatrick regarded the same as important. However, later, in answer to a question from me, he did accept that he regarded the 2010 SHA as being an important document. I note that during

the course of a board meeting on 2 June 2020, to which I will return in some detail, in response to Mr Fitzpatrick saying that he regarded the 2010 SHA as *"absolutely fundamental that that is our guiding light"*, Mr Crocker responded, seemingly accepting that it was *"yours and my guiding light if you like"*.

77. It is to be noted that the 2010 SHA was signed on behalf of Camelot by Mr Fitzpatrick in his capacity as authorised agent of Camelot, and a resolution has been produced authorising him to act in this respect. However, the 2010 SHA itself erroneously referred to Mr Fitzpatrick signing the same as a director of Camelot, which he was not.

78. So far as the terms of the SHA are concerned, they dealt with issues such as the Company's position in respect of the lease granted by Mr Crocker (clause 7), deadlock (clause 8) and transfer of shares (clause 9). The key provisions relevant for present purposes are set out in Schedule A to this judgment. The provisions of the 2010 Articles relevant for present purposes are set out in Schedule B to this judgment.

79. The net result of the restructuring was that following the same, Mr Crocker and Camelot each held 41,217 Ordinary shares and 130,000 Preference shares in the share capital of the Company, and the relationship between them was regulated by the terms of the 2010 SHA and the 2010 Articles.

80. On 24 September 2010, Mr Fitzpatrick sent an email to Mr Coventry that attached a handwritten document and said: *"Confirmation of agreed transaction with BK for 10% shareholding in Pedham Place Golf Centre Limited"*. The attached manuscript document appears to record Mr Fitzpatrick and Mr Keaney each having an interest of 25% in the Company with a value of £350,000, and to record a sale by Mr Keaney of 10% to Mr Fitzpatrick at a price of £140,000. The document was signed by Mr Fitzpatrick and Mr Keaney. Mr Fitzpatrick was asked about this under cross examination and played down the significance of it, describing the relevant wording as *"clumsy"*. It was put to him by Mr Zaman KC that he had had an *"off the books"* arrangement with Mr Keaney. Mr Fitzpatrick denied this saying: *"no, it's not. It's because I did not implement that agreement."* He went on to say that no money was paid to Mr Keaney. However, it is to be noted that very shortly thereafter, Mr Keaney resigned as a director of the Company on 1 November 2010.

81. In paragraph 18 of his Defence, Mr Crocker pleaded that he became aware that Mr Fitzpatrick had bought Mr Keaney out of his Nisma Settlement interests. In response to a Request for Further Information in relation thereto, Mr Crocker replied as follows:

> *"To the best of his recollection, in Autumn 2010 Mr Crocker had a conversation in passing with Mr Fitzpatrick, who said that he had bought Mr Keaney out of the Company, which Mr Crocker understood to mean the Nisma Settlement. Shortly after this Mr Keaney resigned as a director of the Company."*

82. If there was any such conversation then it is, as I see it, likely to have been after Mr Fitzpatrick bought out Mr Keaney's interest in VGC and other entities prior to Mr Keaney's retirement on 1 June 2009 as mentioned by Mr Fitzpatrick in cross examination as referred to above. Consequently, I do not consider that this assists as to whether there was any subsequent arrangement with Mr Keaney so far as the Nisma Settlement is concerned, to the extent that that might be relevant.

83. Pursuant to a loan agreement dated 9 October 2010, NatWest agreed to lend £440,000 to the Company conditional on Mr Fitzpatrick and Mr Crocker each providing personal guarantees, which they did up to £100,000.

84. It is Mr Fitzpatrick's evidence that he was advised that certain matters relating to the Nisma Settlement required to be documented, and so on 26 October 2010, he signed a document headed *"Nisma Settlement - Letter of Wishes"* addressed to *"the trustees of the settlement"*. This is in the following terms:

> *"As administrator of this trust that was settled on behalf of my brother-in-law Desmond Murray I confirm that it was his express intention that the trust was established for and would continue to be for the benefit of his sister Mrs Olivia Fitzpatrick, her children and their issue.*
>
> *I confirm that this remains the position and that it is my wish that the trustees administer the trust and exercise their discretion in the interests of these beneficiaries."*
>
> [My emphasis added]

85. The reference to the Nisma Settlement being *"established for"* Mr Fitzpatrick's wife, children and other issue was consistent with an answer that Mr Fitzpatrick had provided on 10 May 2023, verified by statement of truth, to a Request for Further Information where it was stated:

> *"Mr Fitzpatrick does not know the date on which Olivia Fitzpatrick and the Claimants were added as beneficiaries to the Nisma Settlement, nor the procedure by which they became beneficiaries. Mr Murray told Mr Fitzpatrick that it was his intention that Olivia Fitzpatrick and the Claimants would be made beneficiaries of the Nisma Settlement in or around 1995. Mr Fitzpatrick told Mrs Fitzpatrick that it was intended that she and the Claimants would be the beneficiaries of the Nisma Settlement shortly thereafter."*
>
> [My emphasis].

86. Of course, if the Nisma Settlement had been established for the benefit of Mr Fitzpatrick's wife, children and other issue, and if Mr Fitzpatrick had been told in 1995 of Mr Murray's intention that the latter should benefit, then that would be inconsistent with what was said to HMRC by Abbots letter dated 8 September 2005 referred to in paragraph 59 above. In his witness statement for trial, Mr Fitzpatrick sought to correct matters by stating that it was only in 2009 that Mr Murray made his wishes known.

87. I put this inconsistency to Mr Fitzpatrick in a number of questions at the end of his evidence. In response, Mr Fitzpatrick stated that the document that he signed on 26 October 2010 would have been prepared by Mr Coventry on the basis of information that came from him himself. When I put to Mr Fitzpatrick that the document appeared to be recording that the trust was set up for and would continue for the benefit of his wife and children, he responded as follows:

"A. No. It only became for the benefit of my wife and children in June 2009. So before that, I did not know who the beneficiaries were.

JUDGE CAWSON: So why, in giving instructions to Mr Coventry as the form of this, you should have said that it was established for the benefit of your wife and children?

A. This is wrong. It was set up by Dessie and when he was very ill in 2009 he made my wife and my daughters the beneficiaries and the reason he gave at the time was that his wife and daughter were going to settle in Australia. They did not want -- they would not be able to get involved in the management of a golf course in the UK, and his words were, "Especially one that wasn't making any money".

JUDGE CAWSON: my question was why do you think, on 26 October 2010, you would have given instructions to Mr Coventry saying that it was established for –

A. That is incorrect.

JUDGE CAWSON: Why do you think you would have made that mistake?

A. I don't know why I made it. I don't know why I made it. I don't know what led to this. It must've been a request from Chris Bateson or something like that. That is an error there which I am unable to explain."

88. I note that loans were made to the Company by Mr Fitzpatrick on 13 September 2010 (£100,000), 27 October 2010 (£23,000) and 18 February 2011 (£35,000).

89. With the benefit of further investment in the Company, the clubhouse was constructed and opened in March 2011.

90. From June 2012, Mrs Boyes and Mrs Powell began to attend board meetings. The minutes of the board meeting on 1 June 2012 recorded that the two *"girls"* would start to join in with meetings and be included on emails.

91. There has been disclosed what purports to be a letter dated 19 July 2012 from Camelot (Mr Bateson) to Mr Coventry in which Mr Bateson indicated that Camelot wanted to dispose of its interest in the Company, and would be prepared to accept £25,000 for the same and for shares in London Irish Holdings Limited. It referred to Mr Bateson seeking Mr Coventry's assistance in identifying a purchaser. It is now common ground that this letter was not created on 19 July 2012, but is a subsequent creation, produced following on from an email dated 15 January 2013 from Mr Bateson to Mr Coventry. In this latter email, Mr Bateson stated that *"following our many discussions, I have in mind issuing the letter to you dated 19 July 2012 along the following lines ..."*. What is essentially the text of the letter dated 19 July 2012 was then set out for Mr Coventry's *"thoughts/comments or amendments"*.

92. It is the Fitzpatrick Parties' case that the letter dated 19 July 2012 was simply created to provide a paper trail recording the substance of discussions between Mr Bateson and Mr Coventry dating back to July 2012 relating to the possible sale of Camelot's shares in the Company, and that nothing sinister should be read into it. Mr Fitzpatrick refers,

in his witness statement, to Mr Coventry having rung him in 2012 to tell him that he had been approached by Mr Bateson *"of Camelot"* and asked to look for a potential buyer for the Nisma Settlement's interest in the Company.

93. There was an issue as to whether the email dated 15 January 2013 had been properly disclosed, and a point was taken on behalf of Mr Crocker complaining that it had not. However, I am satisfied that a proper explanation has been provided by the Fitzpatrick Parties' Solicitors that this particular email had not been picked up in a trawl through extensive and repetitious email correspondence.

94. However, it is Mr Crocker's case that there are more sinister connotations behind the alleged creation of a paper trail, and Mr Zaman KC maintained that that Mr Coventry and Mr Bateson engaged in *"criminal conduct"* in *"forging"* the letter dated 19 July 2012.

95. The fact that the discussions between Mr Bateson and Mr Coventry must have taken place along the lines of the letter dated 19 July 2012 is supported by the fact that Mr Coventry emailed Mr Fitzpatrick on 25 September 2012 as a prospective purchaser, and indicated a value of £32,000 for Camelot's shares in the Company as a noncontrolling interest, albeit that Mr Coventry recommended that an independent expert opinion be sought. Mark Smith was suggested by Mr Coventry for this purpose notwithstanding his connection to Mr Crocker. I note that in this email dated 25 September 2012, Mr Coventry stated that: *"I am aware that the Nisma Settlement is keen to dispose of its shareholding and that you are happy to acquire it at a reasonable price, more to help out Desmond's estate than for any other reason."* This is, perhaps, a rather odd comment if Mr Fitzpatrick's wife and daughters were being treated as the effective beneficiaries of the Nisma Settlement.

96. On 12 October 2012, Mark Smith emailed Mr Fitzpatrick with his views on the value of the shares held by Camelot, as trustee of the Nisma Settlement, and stated that Mr Coventry's suggested value of £32,000 was *"if anything, a little on the high side."*

97. By a deed dated 15 August 2013, made between himself and the Fitzpatrick Trustees, Mr Fitzpatrick established the FFDS, appointing the Fitzpatrick Trustees as trustees thereof. The *"Discretionary Beneficiaries"* were identified as being Mr Fitzpatrick's widow, Mr Fitzpatrick's children and remoter issue, and such other persons or charities as were added under clause 3 of the deed.

98. On 19 August 2013, Mr Coventry emailed Mr Bateson and confirmed a formal offer on behalf of the Fitzpatrick Trustees to purchase the Ordinary and Preference shares held by Camelot in the share capital of the Company for £25,000, and the shares held by Camelot in London Irish Holdings Limited for £100. On 27 August 2013, Mr Bateson emailed Mr Coventry and confirmed: *"the Trustees have now met and approved the sale of the following to the Fitzpatrick Family Discretionary Settlement"*, referring to the purchase of Camelot's shares in the Company for £25,000, and the purchase of Camelot's shares in London Irish Holdings Limited for £100. A file note has been produced recording that Mr Coventry called Mr Fitzpatrick on 27 August 2013 to advise him that the *"offer"* for the shares in the Company and London Irish Holdings Limited had been *"accepted"* by the *"Nisma Settlement"*.

99. On 2 September 2013, Mr Coventry emailed Stephen Lewin, a Solicitor with Bircham Dyson Bell, the Solicitors who acted in relation to the establishment of the FFDS, informing him that the trustees of the Nisma Settlement had agreed to accept £25,000 for the shares in the Company and £100 for the shares in London Irish Holdings Limited, and that a bank account for *"the new trust"* was in the course of being opened, and that as soon as it was, Mr Fitzpatrick proposed settling £25,500 in cash into that account: *"to deal with the share purchase and leave a small working balance."*

100. There is then a gap in the email correspondence until 26 November 2013 when Mr Coventry emailed Mr Bateson to inform him that: *"The Fitzpatrick Family Discretionary Settlement is now in a position to complete the purchase of the shares as follows"*, reference then being made to the purchase of the shares in the Company for £25,000 and the purchase of the shares in London Irish Holdings Limited for £100.

101. On 6 December 2013, Mr Bateson sent a letter to Mr Coventry enclosing an executed stock transfer form in respect of the 41,217 Ordinary shares in the Company held by Camelot. No share transfer form in respect of the 130,000 Preference shares was provided at that point.

102. It was Mr Fitzpatrick's evidence that between September and November or December 2013, he discussed the proposed transfer of shares with Mr Crocker on a number of occasions, both on the telephone and when they were together after board meetings in his office at the Golf Club. He says that both men were aware that Mr Crocker's consent was required (in view of the terms of the 2010 SHA and the 2010 Articles), and that they discussed the transfer of shares held by Camelot to the FFDS, as well as the assignment of Camelot's rights and interests under the 2010 SHA, The Fitzpatrick Parties say that during these discussions, Mr Fitzpatrick made it clear that the terms of the 2010 SHA were fundamental to the proposed share transfer as he considered it to be very important that the equality of shareholding and the rights under the 2010 SHA would continue to be adhered to, and that Mr Fitzpatrick informed Mr Crocker that the FFDS would not acquire the shares without assurances in this respect. It is their case that Mr Crocker did not object, and indeed that he orally agreed to the transfer of shares and the transfer of the 2010 Shareholders Agreement to the FFDS,

103. It is further the Fitzpatrick Parties' case that, contrary to the allegations now made by Mr Crocker, Mr Fitzpatrick did not represent during these discussions or at any other time that the Nisma Settlement was his *"offshore trust",* that the transfer of shares from the Nisma Settlement to the Fitzpatrick Trust was a transfer between two Fitzpatrick family trusts or that the proposed share transfer was permitted under the 2010 Articles. This was said to be on the basis that Mr Crocker knew that the Nisma Settlement was Mr Murray's trust and that Mr Fitzpatrick was authorised to act on its behalf.

104. Although not mentioned in Mr Fitzpatrick's witness statement, in the course of evidence, Mr Fitzpatrick referred to a board meeting on 25 November 2013 attended by, amongst others, Mr Fitzpatrick, Mr Crocker, Mr Fortune, Mrs Powell and Mrs Boyes. The minutes of this meeting make no mention of any transfer of shares by Camelot, but in the course of his oral evidence, Mr Fitzpatrick described the circumstances leading up to Mr Coventry's email dated 26 November 2013 referred to in paragraph 89 above as follows:

> *"Because I was not prepared to proceed with the purchase unless I had the full agreement from John Crocker, that I had his permission to make – for the shares in Nisma to be acquired by the family trust. The shares were transferred. The 2010 shareholders' agreement, with all the terms that go with that, was also accepted and would transfer that to them, that we would carry on with the shares being held in the family trust in exactly the same way as we had managed the business while the shares were in the Nisma Settlement. I got those assurances from John Crocker, I believe, after the meeting on – the board meeting, which was on 25 November. Then on the 26th I authorised Steve Coventry to contact Chris Bateson and proceed with the acquisition"*

105. Mrs Powell says in her witness statement that she specifically remembers her father telling her on a number of occasions that he had discussed the transfer of shares by Camelot to the FFDS and the 2010 SHA with Mr Crocker. She says that she also remembers Mr Fitzpatrick going up to Mr Crocker's office both during and after board meetings, and her father telling her after these meetings that he had discussed the transfer of shares with Mr Crocker thereat. During the course of her evidence, she gave more of an explanation in relation to this, explaining that when she attended board meetings, she would first go to her parents' house in Hillingdon before travelling down to the Pedham Place Golf Centre in the car together with her father, a journey that took about 90 minutes each way. She said that she and her father would converse during the course of these journeys, and that it was in this context that her father mentioned to her his discussions with Mr Crocker.

106. When it was put to Mrs Powell that the discussions between Mr Fitzpatrick and Mr Crocker that she described did not take place, Mrs Powell insisted that they did. When she was asked "*How would you know they happened*", Mrs Powell replied "*Because he* [Mr Fitzpatrick] *told me about them*". She was asked if that was the only basis on which she could say they happened, and she said that it was. Mr Maynard-Connor KC submits that Mrs Powell's evidence that her father told her about the discussions he had with Mr Crocker during this period in respect of the transfer of shares and assignment of the 2010 SHA was not challenged in cross examination. However, Mrs Powell was, as referred to above, challenged as to whether Mr Fitzpatrick had ever had the relevant conversations with Mr Crocker. Further, later in her evidence, she was asked why she did not challenge Mr Crocker at the subsequent board meeting on 2 June 2020 when he had referred to the *"very brief conversation"* about transferring the Nisma Settlement's shares. Mr Heylin put to her: *"You didn't at that point say, John, that's not right , those words are not right, I know about this because my father told me about this at the time, there were a lot of conversations about this"*. I took this to be a challenge to Mrs Powell about her father having told her about his discussions with Mr Crocker regarding the transfer of shares to the FFDS in that the implication behind the question is that if Mr Fitzpatrick had told her about the discussions, then she would have challenged Mr Crocker at this stage of the meeting on 2 June 2020.

107. Mr Crocker's position in respect of any giving of consent to a transfer from Camelot to the FFDS was first articulated in a letter dated 21 June 2019 from Mr Crocker's then solicitors, Warners, to Mrs Powell in which it was asserted that: *"The Nisma Settlement*

ceased to hold any shares after it transferred its shares to the trustees of a different trust (without any notice to our client who became aware of this after the event).”

108. During the course of the board meeting on 2 June 2020, to which I will return, Mr Crocker put forward a rather different explanation of events, saying:

> *“I'm not a lawyer, as you know, and as far as I'm concerned, Sean said to me "Just to let you know ... ", I don't know when it was, what year, it was quite a while ago, we had a very brief conversation, he said "I intend moving my shares onshore to a family trust", and I said "fine" because it didn't mean anything to me, they're his shares he can do what he likes with them.”*

109. In paragraph 90 of his witness statement, Mr Crocker was equivocal as to whether Mr Fitzpatrick said that he was going to transfer the shares or whether he said that he had transferred them. In the course of his oral evidence, Mr Crocker said that he genuinely could not recall whether Mr Fitzpatrick informed him in advance that the shares were to be transferred to an onshore trust, or whether he was informed after the event. The gist of his evidence was that there was just one telephone call, made as a courtesy call, in which Mr Fitzpatrick informed him either that the shares were to be transferred, or that they had been transferred. He denies that he actually gave his consent to any transfer. He says that whenever he was informed about the transfer, in the light of what he had been told by Mr Fitzpatrick, he thought it to be a permitted transfer. He accepted that the relevant telephone call may have been in late 2013, rather than in 2014.

110. In the course of submissions, it was submitted on behalf of the Fitzpatrick Parties that Mr Crocker had accepted that he was aware that Mr Fitzpatrick would rely upon his discussions with Mr Crocker. However, having looked at the transcript, I am not satisfied that this was the case. The general tenor of Mr Crocker’s evidence on the point can be gathered from the following extract from the transcript of his cross examination on day 8 of the trial:

> *“Q. You knew and understood that your consents to the transfer and the assignment were being relied upon and would be relied upon when those transactions took place both by Camelot and by the Fitzpatrick Trust, correct?*
>
> *A. I’m very sorry, you will have to repeat that question, I just didn’t understand it.*
>
> *Q. You are giving your consent, correct?*
>
> *A. Yes.*
>
> *Q. And you’re giving your consent to the transaction? You say on your case it’s just the share transfer?*
>
> *A Correct –*
>
> *Q. Right.*
>
> *A. On a phone call.*

Q. You know that the giving of your consent is going to be relied upon by Camelot as the Seller and by the Fitzpatrick Trust as the buyer; agreed?

A. Now, yes. At the time it was -- I thought it was just, you know, a permitted transfer. I didn't delve into who was doing what.

Q. If you thought it was a permitted transfer, why was Mr Fitzpatrick asking for your consent?

A. He wasn't. It was just a courtesy call.

Q. I put it to you he was asking for your consent.

Q. No, sir."

111. In the course of his evidence, Mr Crocker did accept that he and Mr Fitzpatrick met on a regular basis outside formal board meetings, with Mr Fitzpatrick visiting the Golf Course approximately once a month, when he and Mr Crocker would discuss all that required to be discussed so far as the running of the golf course was concerned.

112. In his witness statement, Mr Fortune said that he remembers that in or about 2014, Mr Fitzpatrick mentioned at a board meeting that he was going to transfer his shares in the Company from the Nisma Settlement to the Fitzpatrick Settlement. He says that he thought that it was *"just a question of Sean Fitzpatrick simply saying that this was what was going on, and he was just informing the board, but that is all I can recall."* Mr Fortune expressed matters in somewhat similar terms at the board meeting on 2 June 2020.

113. In an email dated 9 January 2014, Mr Coventry referred to posting a cheque for £25,100 to Mr Bateson *"in respect of the shares"*.

114. The Fitzpatrick Parties have produced and rely upon a Deed of Assignment dated 9 January 2014 ("**the 2014 Deed of Assignment**") between FFDS and Camelot, signed on behalf of the latter by Mr Bateson as director of Camelot. This recites, amongst other things, that the FFDS had offered to purchase the shares held by Camelot in the Company along with *"an assignment of all rights and obligations attaching to such Shares pursuant to the [2010 SHA] for the sum of £25,000."* The 2014 Deed of Assignment then provided that in consideration of the payment of £25,000 by FFDS, Camelot, in its capacity as trustee of the Nisma Settlement, agreed to transfer the legal and beneficial interest in the relevant shares and to assign all of its rights and obligations under the terms of the 2010 SHA for the sum of £25,000.

115. It is common ground that Mr Crocker was not provided with a copy of the 2014 Deed of Assignment. It is his evidence that he did not know of the existence thereof until the service of the Particulars of Claim in the present proceedings. I do not understand this to be disputed.

116. On 9 January 2014, Mr Coventry wrote to RE Jones & Co. enclosing Camelot's share certificate and stock transfer form in respect of the 41,217 Ordinary shares in the Company.

117. It is the Fitzpatrick Parties' case, and Mr Crocker did not seriously dispute, that the Company was suffering from significant financial difficulties at this time. This is evidenced by, for example, an email from Stephen Coates of Pentland Golf to Mr Crocker and Mr Fitzpatrick dated 11 January 2014 in which he referred to RE Jones & Co. being apprehensive about the Company's funding, and to the fact that the Company had breached its banking covenants the previous year, and that it was likely to do so again that year. The minutes of a board meeting on 17 February 2014 recorded Mr Fitzpatrick and Mr Crocker having agreed that they would each put in £10,000: *"to ease the current shortfall"*.

118. By letter dated 3 February 2014, RE Jones & Co. forwarded to Mr Crocker a new share certificate in the name of *"The Fitzpatrick Family Discretionary Settlement"* for him and Mr Fortune to sign, as well as a copy of the stock transfer form executed by Camelot (signed by Mr Bateson) and dated 9 January 2014 transferring the 41,217 Ordinary shares in the company to *"The Fitzpatrick Family Discretionary Settlement"* for a consideration of £25,000. It was put to Mr Crocker that this would have informed him that the shares were being transferred for the consideration of £25,000 referred to. It was Mr Crocker's evidence that he did not notice the price on the stock transfer form.

119. An issue then arose that no stock transfer form (or new share certificate) had been produced in relation to the transfer of the Preference shares, an issue seemingly identified by Abbots. The issue having been identified, on 13 March 2014, Abbots wrote to RE Jones & Co. confirming that the stock transfer form provided was incorrect, and that revised stock transfer forms would follow in respect of the Ordinary and Preference shares. In a file note dated 17 March 2014 that detailed the mistake that had been made, Mr Coventry referred to an apportionment of the consideration of £25,000 as to £10,000 to the Ordinary shares, and £15,000 to the Preference shares.

120. By way of rectification of the mistake that been identified, revised stock transfer forms dated 17 March 2014 were executed on behalf of Camelot, and new share certificates in respect of the 41,217 Ordinary shares and the 130,000 Preference shares, in the name of the FFDS, were prepared.

121. The new share certificates in the name of the FFDS was signed by Mr Crocker and Mr Fortune. Whilst the share certificates were dated 17 March 2014, the same date as the stock transfer forms, it is clear that Mr Crocker and Mr Fortune must have signed them at some stage thereafter. The Company's register of members was subsequently completed so as to show *"The Fitzpatrick Family Settlement"* as holder of the relevant Ordinary shares and Preference Shares. It is not in dispute that the shares ought not to have been registered in that way, and that the shares ought to have been registered in the name or names of one or all of the Fitzpatrick Trustees. This was ultimately rectified on 3 April 2020, when Mrs Powell, as a trustee of the FFDS, was registered as holder of the relevant shares.

122. The financial statements of the Company for the year ended 31 March 2014 showed loans due to Mr Crocker (£578,584), Mr Fitzpatrick (£203,742), and the Nisma Settlement (£364,641).

123. It was the evidence of Mr Fitzpatrick and Mrs Powell that, in May 2014, Mr Fitzpatrick, together with Mr Coventry, met with Mrs Powell and the other Fitzpatrick Trustees, and that at this meeting the assets of the FFDS were discussed, as were practical

arrangements for the future administration thereof. Further, it is the Fitzpatrick Parties' case that Mr Fitzpatrick also explained that, based on current performance, the FFDS was likely to receive dividend payments from the VGC Group, but that it was unlikely to receive anything from the Company in the short term, although he hoped it would in the long term. It is further the Fitzpatrick Parties' case that the 2010 SHA was specifically discussed, and that all concerned understood its importance. As Mrs Powell was already attending Company board meetings, it is said that it was agreed that she would represent the FFDS's interest in the Company and update the Fitzpatrick Trustees regularly.

124. In the course of his oral evidence under cross examination, Mr Fitzpatrick said that he had met with the Fitzpatrick Trustees prior to discussing the transfer of the Nisma Settlements shares to the FFDS with Mr Crocker. Mrs Powell, in her evidence, had no recollection of any such meeting, saying that the first meeting between Mr Fitzpatrick and the Fitzpatrick Trustees was in May 2014.

125. On 1 May 2014, NatWest agreed to an increase in the Company's overdraft facility, and Mr Crocker and Mr Fitzpatrick were required to provide guarantees up to an amount of £175,000; an increase of £75,000 on the previous £100,000 limit.

126. On 25 March 2015, Mrs Powell and Mrs Boyes were appointed as directors of the Company, having attended board meetings since June 2012.

127. By February 2016, Ronald Crocker was elderly and in poor health, and on 23 February 2016 he resigned as a director of the Company. He subsequently died in October 2016.

128. By a Deed of Assignment of Debt dated 2 November 2016, signed by Mr Bateson on behalf of Camelot, Camelot, as trustee of the Nisma Settlement, assigned the debt due to it from the Company of £364,641 ("**the Nisma Loan**") to Mr Fitzpatrick for a consideration of £3,646, i.e. only 1% of its face value. On 10 November 2016, Mr Coventry emailed Mr Bateson to inform him that Mr Fitzpatrick would like him to *"close the trust down now, whatever that entails"*. This is understood to be a reference to the Nisma Settlement. In response, Mr Bateson replied: *"Absolutely fine Steve, this was factored into the payment as discussed and agreed."*

129. In April 2017, RBS raised a number of queries in respect of the Nisma Loan. In an email dated 27 April 2017 from Mr Fitzpatrick to Mr Coventry, Mr Fitzpatrick asked Mr Coventry to help him: *"with the issues raised on Preferential (sic) shares and the Nisma loan which is now in the Fitzpatrick Family Settlement."* Mr Coventry responded the same day saying: *"the former Nisma loan has, as you rightly say, been assigned at market value to the Fitzpatrick Family Settlement."* The next day, Mr Fitzpatrick emailed RBS to say that: *"The former Nisma loan has been assigned at market value to the Fitzpatrick Family Settlement."*

130. The Deed of Assignment of Debt dated 2 November 2016 was disclosed for the first time in an email dated 28 September 2023 from Mrs Powell to RE Jones & Co, copied in to Mr Crocker. Mrs Boyes made a number of enquiries in respect of the same in an email dated 30 September 2023, raising a point in relation to Mr Fitzpatrick having told RBS that the Nisma Loan had been assigned to the FFDS, when it had actually been assigned to him. Mrs Powell responded to this by way of an email dated 1 November 2023 that provided annotated responses to Mrs Boyes' email, including that:

> *"The information that dad provided to NatWest was incorrect in relation to who the loan was assigned to. This information had been provided to him by his accountant. His accountant subsequently was diagnosed and passed away from a brain tumour. I do not know for sure, but this may well explain the incorrect information that was given to dad and then passed on to the Bank."*

131. Mr Crocker complains that Mr Fitzpatrick acted in breach of his fiduciary duties as a director of the Company in procuring the assignment of the Nisma Loan to himself.

132. On 18 October 2017, there was an exchange of emails between Mr Boyes and Mr Crocker and Mrs Boyes commencing with an email containing some *"Financial Ponderings"* by Mr Boyes regarding funding the development of *"Adventure Golf"* at Pedham Place Farm. There were clearly discussions concerning Adventure Golf thereafter involving Mr Fitzpatrick, in the context in which, on 18 December 2017, Mr Fitzpatrick emailed Mr Bracher requesting a copy of the signed 2010 SHA, which Mr Bracher duly provided on 22 December 2017.

133. On 17 February 2018, Mr Boyes emailed Mr Crocker asking him whether he had a copy of the final/executed version of the 2010 SHA. Mr Crocker responded the same day to say that: *"I will forward a copy of the SHA to you. Sean requested one from the solicitors, as we will be changing things a little with regard to the Adventure Golf, but neither of us could find one!"* Mr Boyes responded to this email on 20 February 2018 asking whether he could speak to Mr Crocker: *"just to ensure I have an accurate picture of the situation"*. He then said: *"I think I may have come up with a reasonably surprising conclusion, but these things as always are all about the detail. But equally you might not actually be interested in hearing someone else's 'grand plan', but just wish to get some input on a couple of specific things!!"*

134. From this point on, at least, Mr Boyes played a significant role in representing Mr Crocker's interests and advising him in relation to the future of Pedham Place Farm and his relationship with Mr Fitzpatrick and the FFDS, and it was clear from Mr Crocker's evidence that he has placed considerable trust in Mr Boyes in this respect. Mr Boyes was present throughout the trial, apart from closing submissions, sitting on the row in front of Mr Crocker next to Mr Crocker's Solicitors.

135. The Fitzpatrick Parties complain that Mr Boyes has, in a number of instances, acted in an underhand, if not dishonest manner in respect of matters to which I will return, and that I should draw adverse inferences against Mr Crocker from the fact that Mr Boyes has not been called as a witness. The evidence suggests that Mr Boyes has not inconsiderable commercial and business experience, and during the course of her evidence, Mrs Boyes explained that her father, Mr Crocker, has placed considerable reliance upon Mr Boyes essentially because he is a farmer with limited commercial acumen, she herself is a housewife, and that they have been dealing with Mr Fitzpatrick, a very experienced and successful businessman running businesses with a turnover in excess of £100 million per annum, and also with Mrs Powell, a qualified Solicitor with experience of commercial law.

136. Unfortunately, the relationship between the parties began to break down during the course of 2018.

137. At Mr Crocker's request, on 20 June 2018 a meeting took place after the Company's board meeting in order to discuss a potential development opportunity for Pedham Place Farm. Those present at the meeting were Mr Fitzpatrick, Mrs Powell, Mr Crocker and Mr Boyes. Mr Fitzpatrick and Mrs Powell were informed at this meeting that a new Local Plan for Sevenoaks was in the process of being developed, and that Mr Crocker intended to promote Pedham Place Farm for development. It is the Fitzpatrick Parties' case that Mr Fitzpatrick indicated that the FFDS would propose funding half of the costs of the promotion on the basis that Mr Crocker and the FFDS were equal shareholders in the Company. It is their case that Mr Boyes immediately rejected the proposal without Mr Crocker demurring.

138. Draft *"reg 18 documents"* were subsequently, in July 2018, produced by CBRE, who acted for Mr Crocker. Having been sent copies, Mrs Powell raised concerns about the way in which the Company's leasehold interest was being represented in the promotion of Pedham Place Farm, in that she contended that it was being wrongly represented in the documentation that the land was immediately deliverable, which it was not because of the Company's leasehold interest.

139. In September 2018, an issue had arisen regarding *"Non-Golf Turnover Rent"*, a matter covered by clause 7.6 of the 2010 SHA. On 20 September 2018, Mr Crocker emailed Mr Boyes and Mrs Boyes to say that he thought that there was a provision in the Company's lease:

> *"… for a 5% uplift on all other income to be paid as part of the rent, but only once the turnover had reached a certain threshold, which I think was 1.2 or 1.25 million. … I also think that this arrangement applied to Sean, or his family trust, so that whatever I received in rent from the 5% situation, was matched equally to his benefit. … Perhaps we should have a look at the lease (and the Shareholders' agreement?) to check it."*

140. On 25 September 2018, Mrs Powell emailed Mr Boyes, referring to the meeting the previous June and the fact that Mr Fitzpatrick/the Fitzpatrick Trustees had put forward a proposal thereat and had made clear that it was imperative to agree a deal, and she complained that no proposal had been received *"from you"*. She maintained that until the parties had a *"formal agreement"*, Mr Crocker should cease to have *"further discussions with any stakeholders or development partners."* Mrs Powell drew attention to the 2010 SHA, which she alleged *"you are in breach of"*. Mr Boyes responded the same day to say that he could not agree to Mrs Powell's request, going on to say: *"I am probably less familiar with the [2010 SHA] then you are. Could you please clarify in what respect you believe there is a breach?"* In response to this, Mrs Powell suggested that Mr Boyes should familiarise himself with the 2010 SHA, *"particularly the provisions of the Schedule which are matters that require Shareholder Consent."* Mr Boyes responded to this to say that he had studied the reserved matters, and was none the wiser, saying: *"Are you alleging that John has taken one of these actions without consent?"*

141. Further correspondence ensued on this issue. In an email dated 8 October 2018, Mr Boyes wrote to Mrs Powell saying:

> *"As landowner John is free to promote his land for sale. The [2010 SHA] (7.5) considers this exact scenario and provides that in the event that such promotion results in an offer to purchase the land then the other shareholder in [the Company] would first be offered the chance to make such a purchase on identical terms."* The email concluded by saying: *"I would reiterate my point that we are not going to enter into a negotiation between shareholders whilst there is an unsubstantiated allegation of a SHA breach hanging over us. Please substantiate or withdraw this allegation."*

142. The Fitzpatrick Parties complain that, unbeknown to them, at this time Mr Crocker and Mr Boyes were discussing the determination of the leasehold interests of the Company, and thus that of the FFDS as a shareholder in the Company, in Pedham Place Farm, in order to facilitate the proposed development. Such discussions extended to Mr Church of CBRE UK, as demonstrated by an email from Mr Boyes to Mr Church dated 26 October 2018 in which Mr Boyes said:

> *"I have formal legal advice in progress on four different potential 'nuclear' routes by which we can take out the lease/leaseholder if it becomes absolutely necessary, so if they don't come to the table soon I may have to show them what's behind door number two, in order hopefully to get them to play ball."*

143. The reference to *"they"* was clearly a reference to the Fitzpatrick Parties. However, it is fair to say that Mrs Boyes, when cross examined on this letter, said that the desire was to negotiate a deal with the Fitzpatrick Parties hence the reference to showing them what was *"behind the door"* in order to get them to *"play ball"*, i.e. do a deal.

144. Mr Crocker was asked in cross examination about an email dated 9 December 2018 sent to him and Mrs Boyes by Mr Boyes ahead of a board meeting due to take place on 10 December 2018 that provided what was, in essence, a briefing note for the board meeting and how they should handle Mr Fitzpatrick and Mrs Powell thereat, including informing them that any discussion with regard to Mr Crocker's status as freeholder or shareholder was inappropriate to be raised at a board meeting. Mr Boyes referred them to clause 3.3.1 of the 2010 SHA dealing with matters not on the agenda for the meeting. Mr Crocker responded to this email by saying: *" I shall read this several times tomorrow morning and hopefully digest! I have no doubt that Emma [Mrs Boyes] will be ready to divert me from any faux pas!!"*

145. By reference to this correspondence, it was put to Mr Crocker in cross examination that Mr Boyes was telling him what to say at the meeting and providing a high level script. Mr Crocker rejected this interpretation, saying Mr Boyes was simply advising him. It was put to him that he knew and understood that the terms of the 2010 SHA were still binding. He responded to this by saying: *"At that time I -- yes, I would have thought so."*

146. In January 2019, a meeting took place between Mr Boyes and Mrs Powell at the Piccolino restaurant in Hale. At this meeting, Mr Boyes revealed that in late 2018 Mr Crocker had agreed to a promotion agreement in respect of the development of Pedham Place Farm with Gladman Developments Ltd ("**Gladman**"), which was not otherwise disclosed or notified to the Company's board. The agreement with Gladman was an

"Agreement for the promotion and disposal of land" between Mr Crocker and Gladman dated 11 December 2019 that was executed by way of deed ("**the Gladman Deed**").

147. Following on from this meeting, on 4 March 2019, Mrs Powell sent an email to Mr Boyes and Mr Crocker, but addressed to Mr Boyes ("*Dear Matt*"). She expressed disappointment at having to write the email, but stated that she had no option but to formally write and set out the position of the FFDS in respect of *"the Company, and its relationship with John [Crocker] as freeholder of the land at Pedham Place Farm …"* The email drew Mr Boyes' attention to the fact that the Company had a leasehold interest until 31 December 2093 under the two leases dated 19 December 1994 and 24 May 2010 respectively. She reminded him about directors' general duties under ss. 171-177 of the Companies Act 2006 ("**CA 2006**"), as well as provisions of the 2010 Articles and the 2010 SHA. She raised a concern that it had been represented to Sevenoaks Planning Department that the relevant land *"can be made available for phase development to commence immediately"* when, so it was said, Mr Boyes knew that this plainly was not true. Further, the email raised concerns as to lack of information and transparency, and Mrs Powell requested a copy of the agreement entered into with Gladman. This request was refused without agreement to enter into a non-disclosure agreement, which Mrs Powell and Mr Fitzpatrick declined to provide.

148. It was at this stage that Solicitors first became involved, with Warners, by their letter dated 21 June 2019, setting out a substantive response to Mrs Powell's email dated 4 March 2019. In this letter, it was alleged, for the first time, that the 2010 SHA had terminated pursuant to clause 13.1 thereof, which provided that the 2010 SHA should determine *"when one party ceases to hold any Shares"*. Reference was made to clause 1.14 of the 2010 SHA providing that the parties to the 2010 SHA were the Trustee of the Nisma Settlement and Mr Crocker, and that clause 18.1 provided that no party may assign its rights under the 2010 SHA without the prior written consent of all parties. It was in this context, that the letter came to state, as referred to in paragraph 107 above, namely that:

> *"The Nisma Settlement ceased to hold any shares after it transferred shares to the trustees of a different trust (without any notice to our client who became aware of this after the event)."*

149. The Fitzpatrick Trustees' Solicitors, JMW, replied to Warners' letter dated 11 July 2019, by letter dated 6 August 2019. In dealing with the allegation that the 2010 SHA had terminated, and that the relevant shares had been transferred without any notice to Mr Crocker, JMW said this:

> *"In the same vein, and additionally, our client discussed his plan to effect an assignment of the assets of the Nisma Settlement to the [FFDS] with your client on numerous occasions prior to so doing. Initially, this was to check that your client was agreeable to the suggestion, which he confirmed that he was. We should say at this point that it had always been the custom of both your client and Sean Fitzpatrick to conduct their business by way of face to face meetings and/or telephone calls, rather than reducing matters to writing. This was no exception. The claim now by your client that he only became aware of the assignment after it had been effected is totally untrue*

and another example of your client presenting a false position to try to benefit his own ends.

Moreover, if, as you say, your client only became aware of the assignment after the event, it is completely incredible that he neither (i) stated that he disagreed with it and/or (ii) stated that, in his opinion, this then terminated the shareholders agreement and (iii) failed to record these positions in written correspondence given their obvious importance."

150. In March 2020, a copy of the Gladman Deed was provided to the Fitzpatrick Parties.

151. On 16 March 2020, Mr Crocker sent an email to Mr Fitzpatrick, Mrs Powell, Mr Fortune and Mrs Boyes in which he referred to an intention to resign his directorship of the Company by the start of the summer, when, so it was said, he would probably also transfer his shareholding in the Company to his daughters at the same time. He proposed that Mr Boyes be appointed as a director, albeit saying that Mr Boyes had suggested a caveat that he would abstain from all voting so as to avoid any suggestion that his appointment would cause there to be unbalanced board. Mr Crocker asked that his appointment be approved by 19 March 2020 given that the board was due to meet, or at least speak, within the next few days. Mr Fitzpatrick and Mrs Powell say that, despite their concerns, they reluctantly agreed to Mr Boyes' appointment as a director.

152. In the course of their cross examination, both Mr Crocker and Mrs Boyes were cross examined about an email dated 18 March 2020 from Mr Boyes to Mr Crocker in which Mr Boyes referred to the fact that he had had a 45 minute chat with Mr Fortune who had been:

"quite direct actually that he's secretly a "Crocker" director even though he's supposed to be independent! ... He kept making the same point which is "Pedham Place is a Crocker venture". I told him that we agreed, but that that wasn't something that Sean was happy to be told!"

153. The Fitzpatrick Parties complain that that they were not informed, prior to voting for Mr Boyes' appointment as a director, that Mr Fortune regarded himself as *"secretly"* a *"Crocker"* director in circumstances in which Mr Fortune had been held out as acting independently. It was put to Mr Crocker that Mr Fitzpatrick and Mrs Powell should have been told that Mr Fortune was *"his man"*, and that in not telling them, Mr Crocker had intended to deceive them. The cross examination went as follows:

"Q. Right. Do you accept that you intended to deceive them and you did deceive them?

A. Well, yes, okay.

Q. "Yes, okay"? Right. And for the transcript -- you cannot look at them, you can look at me -- do you accept that Mr Boyes, your daughter, and John Fortune also intended to deceive my clients and did deceive them?

A. It 's difficult to say.

Q. It 's difficult to say because the answer is difficult to give, isn't it ? The truth is you all intended to and you all did deceive them; correct?

A. Well, I didn't see it like that. As you put it like that, I suppose it could be considered that."

154. On 19 March 2020, Mr Boyes was appointed as a director of the Company.

155. On 3 April 2020, Mrs Powell, as a trustee of the FFDS, was registered in the Company's register of members as the holder of 41,217 Ordinary shares and 130,000 Preference shares, thereby rectifying the position given that the register of members had previously referred to the holder of the relevant shares as the *"Fitzpatrick Family Discretionary Settlement"*.

156. On 18 April 2020, Mr Boyes emailed Mr Church, with the subject line *"Crocker/Fitzpatrick Brain Dump"*. The email provided, as had been promised, *"a 'short' summary of the situation and my thinking around it."* The summary provided suggested:

> *"... three obvious routes by which John [Crocker]'s might unblock development on his land:*
>
> *1. John buys the Fitzpatricks out of the leasehold company, after which he controls the freehold and the leasehold*
>
> *2. John as landlord does a deal with [the Company] as his tenant to vary the lease such that some future surrender is agreed*
>
> *3. John (as creditor, shareholder, and landlord) declines to continue to support the tenant and then waits to see whether it ends up insolvent, in which case the lease is forfeit and the tenant gets nothing."*

157. The email dated 18 April 2020 went on to say that: *"Option 3 is genuinely our preference"*, but that whilst Mrs Powell could refuse to allow Option 1 to progress, she could not stop Option 2 or 3 from happening.

158. By this stage, the country was in lockdown in consequence of the Covid 19 pandemic. The Fitzpatrick Parties' evidence is that Mr Fitzpatrick became seriously ill with Covid and took some considerable time to recover.

159. On 13 May 2020, Mr Boyes sent an email to the Company's board alleging that the Company was insolvent and asserting that a formal insolvency process might not be capable of being avoided. The Fitzpatrick Parties maintain that such contentions were baseless, and that the assertions were advanced as part of a plan to determine the interests of the FFDS, through the Company, in Pedham Place Farm.

160. On 26 May 2020, Mr Boyes sent to Mr Crocker, within an email, the wording of a draft email to Mr Fitzpatrick and Mrs Powell regarding the status of the 2010 SHA, enquiring

as to who it was contended the other shareholder in the Company was, and who it was contended had been the other shareholder after the 2014 Transfer. On 27 May 2020, Mr Crocker sent an email in these terms to Mr Fitzpatrick and Mrs Powell.

161. Against this background, a board meeting was arranged for 2 June 2020.

162. During the course of the trial, disclosure was provided by Mr Crocker of an email sent to him by Mr Boyes in the early hours of 2 June 2020, subject *"Cheat Sheet"*. The email attached a three-page document setting out a number of suggestions as to how the meeting on 2 June 2020 ought to be handled by Mr Crocker, Mrs Boyes and Mr Boyes. This included comments such as:

> *"Do not entertain discussion of what might have been. It doesn't matter what might have happened in 2014 if Sean had asked to assign the SHA, or if Donna had declared herself to be a shareholder, etc etc. the present as the present."*
>
> *"Neither JF or EB has ever even seen the SHA, let alone been asked to follow its*
>
> *provisions."*
>
> *"The SHA has never played any part in how the company is run."*

163. The *"Cheat Sheet"* included a section entitled *"THE PAST/THE FUTURE/ ANGRY JOHN"* setting out what was, in effect, a script for Mr Crocker to adopt to seek to persuade the Fitzpatrick Parties that he was being serious. Mr Boyes sent a supplemental email at 8:23 AM on 2 June 2020, to which Mr Crocker responded to say that he would call Mr Boyes: *"in five minutes, just to run through a few of your points."*

164. The Fitzpatrick Parties maintain that the *"Cheat Sheet"* not only contained a script devised by Mr Boyes for Mr Crocker to deploy at the meeting on 2 June 2020, but that the *"Cheat Sheet"* provided for Mr Crocker to say things that were plainly incorrect, and present what was described by Mr Maynard-Connor KC as *"a false narrative"*.

165. The meeting of the board of the Company duly took place on 2 June 2020. Those present were Mr Crocker, Mr Fortune, Mrs Boyes, Mr Boyes, Mr Fitzpatrick and Mrs Powell. As the country was in lock down in consequence of Covid, the meeting was held remotely by Zoom, with the various participants being in different locations. Mr Fitzpatrick and Mrs Powell complain that the meeting was secretly recorded by Mrs Boyes without them knowing that it was to be recorded. The recording was played during the course of the opening of the case, and I have been provided with a sound file of the same which I have taken the opportunity to listen to again. In addition, a transcript has been produced of the discussions at the meeting.

166. Both the Fitzpatrick Parties and Mr Crocker each rely upon things said at this meeting as supporting their cases respectively.

167. Amongst other points, the Fitzpatrick Parties rely upon:

i) What is said to be the inconsistency between the case as expressed in Warners' letter dated 21 June 2019 regarding the transfer of shares to FFDS in 2014

having been affected without any notice to Mr Crocker, who only became aware thereof after the event, and what was said by Mr Crocker at the meeting at 08:52 minutes into the meeting as set out in paragraph 108 above to the effect that there had been a very brief conversation in which Mr Fitzpatrick had said: *"I intend moving my shares onshore to a family trust"*, i.e. giving notice ahead of the event. As I have mentioned above, a further twist on this emerges from paragraph 90 of Mr Crocker's witness statement in which Mr Crocker is equivocal as to whether Mr Fitzpatrick said that he was going to transfer the shares, or had transferred them, in the short telephone call alleged. Under cross examination, Mr Crocker stuck to this latter version on the basis that he genuinely cannot recall how Mr Fitzpatrick had put it.

ii) At 12:07 minutes into the meeting, Mrs Boyes is recorded as saying: *"Yes but Donna but Donna that's fine but you've put that as the reason that we knew that you were, that the shares were being transferred to you … As John said he knew that Sean wanted to and had. The point is that we weren't told before you did it."* It is maintained by the Fitzpatrick Parties that Mrs Boyes was seeking to row back on what Mr Crocker had said at the meeting, and to get back to the position as expressed in Warners' letter dated 21 June 2019. Under cross examination, she admitted as such, explaining that what she said represented what she had understood her father's position to be.

iii) At 15:08 minutes into the meeting, when commenting on the 2010 SHA, Mr Boyes said: *"… From what I have seen of it, which is not a huge amount, but from talking to John and Emma, appears to have never been used."* It is maintained by the Fitzpatrick Parties that this was disingenuous on Mr Boyes' part given that he had, by then, considered the 2010 SHA in considerable detail as evidenced by a number of his emails.

168. So far as Mr Crocker is concerned, particular matters relied upon by him are:

i) What Mr Fitzpatrick said at 10:20 minutes into the meeting, namely:

> *"Look, John and I had an agreement we discussed many times, that what we were doing was for the benefit of our kids.*
>
> *John was going to pass on, and this was the understanding we had, right from the beginning John, you would be passing on your interest in [the Company] to your daughters, I would be passing on my interest in [the Company] to my daughters.*
>
> *And there never was any question about whether … you know … the Fitzpatrick Family Trust is just the vehicle that is used in order to carry out and to deliver the plans which we had agreed.*

It is maintained on behalf of Mr Crocker that this understanding of Mr Fitzpatrick *"right from the beginning"* is inconsistent with the case now advanced by the Fitzpatrick Parties that the Nisma Settlement was not a trust established by Mr Fitzpatrick for the benefit of his wife and children, but by Mr Murray in circumstances in which Mr Crocker was well aware of the position,

and the prospect of Mr Fitzpatrick's wife and children benefiting only crystallised in 2009, shortly prior to Mr Murray's death.

I would note that Mr Crocker responded by saying: *"I'm not disputing that Sean."*

ii) Other passages within the transcript to similar effect, with no mention ever being made of Mr Murray, or his involvement in relation to the Nisma Settlement.

iii) An alleged failure on the part of either Mr Fitzpatrick or Mrs Powell to correct Mr Crocker's assertion that there had only been a very brief conversation with regard to the transfer of shares to the FFDS.

169. During the course of the trial, Mr Crocker also disclosed WhatsApp communications in the period leading up to, and after the meeting on 2 June 2020. This revealed the following exchange during the course of that meeting:

> *"[02/06/2020, 10:18:44] Matt Boyes: Be very careful. Transferring the shares is allowed!*
>
> *[02/06/2020, 10:25:04] Matt Boyes: calm*
>
> *[02/06/2020, 10:29:35] Emma Boyes: Can you step in soon please.*
>
> *[02/06/2020, 10:29:52] Matt Boyes: not really. your father has epically fuckd this up*
>
> *[02/06/2020, 10:30:13] Emma Boyes: Legal advice says it's dead*
>
> *[02/06/2020, 10:30:34] Emma Boyes: You need to do something."*

170. Both Mr Crocker and Mrs Boyes were cross examined with regard to this WhatsApp exchange. Mrs Boyes accepted that the reference to her father having *"epically fuckd this up"* related either to what Mr Crocker had said at 08:52 minutes into the meeting, or to his response at 02:57 minutes into the meeting to Mr Fitzpatrick's suggestion that the 2010 SHA had been absolutely fundamental, and that it was their guiding light. Mr Crocker had responded saying: *"Well it was yours and my guiding light if you like, but the shareholding has changed Sean, and I'm a little bit confused with all the to-ing and fro-ing as to who the shareholder actually is now."*

171. Following Mr Crocker's production of the Gladman Deed, Mrs Powell subsequently requested a certified copy of it, and a document purporting to be a certified copy was eventually provided by Mr Boyes during August 2020. The Fitzpatrick Parties had concerns regarding this certified copy in that it had been certified by a lawyer who was not from Warners, or the solicitors acting for Gladman, and it was missing a page when compared to the document that had been provided by Mr Crocker. Donna Powell thus pressed for a complete certified copy.

172. By an email dated 9 September 2020, Warners revealed that Mr Boyes had altered clause 19 of the Gladman Deed in the version provided to the Fitzpatrick Parties, which related to vacant possession of Pedham Place Farm, so the terms thereof were falsely represented. As a result, Mrs Powell and Mr Fitzpatrick insisted that Mr Boyes should

have no further ongoing involvement with the Company. In consequence, Mr Boyes resigned as a director of the Company on 1 September 2020. However, as referred to above, he has continued to play a significant role in assisting Mr Crocker with the conduct of the present proceedings.

173. Matters finally came to a head during the second quarter of 2021. During April 2021, Mrs Boyes, and then Warners, proposed the appointment of at least one additional director without reference to the 2010 SHA. Following Mr Crocker's failure to confirm his position with respect to the same during June 2021, the Claim Form was issued on 29 June 2021.

174. It is Mr Crocker's contention that he only became aware of the contention that Mr Murray was behind the Nisma Settlement, and that it was not a family trust established for the benefit of Mr Fitzpatrick's family and/or Mr Keaney's family, upon receipt of the Particulars of Claim. His contention is that, prior thereto, Mr Fitzpatrick had falsely and dishonestly represented to Mr Crocker that the Nisma Settlement was a family trust established by Mr Fitzpatrick, and that it was on this basis that he did not stand in the way of transfer of shares from Camelot, as Trustee of the Nisma Settlement, to the FFDS.

175. Mr Crocker commenced CPR Part 20 proceedings against Camelot and Mr Fitzpatrick on 27 July 2022. As I have said, Camelot plays no part in the proceedings, but Mr Fitzpatrick does, in his own capacity, albeit joining common cause with the Fitzpatrick Trustees.

THE PARTIES' RESPECTIVE CASES

Introduction

176. The present case essentially involves the determination of the questions as to whether:

    i) The transfer of shares affected by Camelot (as trustee of the Nisma Settlement) to the FFDS, i.e. the 2014 Transfer, as now reflected by the registration of Mrs Powell (as a trustee of the FFDS) as holder of the relevant Ordinary shares and Preferential shares, is open to challenge;

    ii) The terms of the 2010 SHA are now, and have since 2014, been binding as between Mr Crocker and the Fitzpatrick Trustees (as trustees of the FFDS).

177. The parties' respective cases therefore require a consideration of the relevant provisions of the 2010 Articles and 2010 SHA, as set out in Schedules B and A hereto respectively.

178. The following provisions of the 2010 Articles are of particular relevance for present purposes:

    i) The pre-emption provisions in Article 6.1 et seq requiring the service of a Transfer Notice before *"transferring or agreeing to transfer"* Ordinary shares, subject to exceptions in the case of:

        a) Permitted transfers by *"Family Trusts"* where there is a transfer to the settlor or to another *"Family Trust"* of which he is the settlor or to any *"Privilege Relation"* of the settlor (Article 5.3); and

b) Transfers approved by the holder of a majority of the Ordinary shares (excluding the proposed transferor) (Article 5.4).

ii) Article 6.9, providing that any purporting transfer of *"Shares"* otherwise than in accordance with the provisions of the 2010 Articles shall be void and have no effect;

iii) Article 6.10, providing that whilst the earlier provisions of Article 6 did not apply to *"Preference Shares"*, the latter might only be transferred with the prior written consent of all other *"Preference Shareholders"*.

179. The following provisions of the 2010 SHA are of particular relevance for present purposes:

i) Clause 9.1, providing, amongst other things, that no party shall transfer any *"Share"* unless it is permitted or required under the 2010 Articles or the 2010 SHA, carried out in accordance with the terms of the 2010 SHA;

ii) Clause 9.2, providing, amongst other things, that a party may do anything prohibited by clause 9 if the other party has consented to it in writing;

iii) Clause 13.1(a), providing that the 2010 SHA shall terminate when one party ceases to hold any *"Shares"*;

iv) Clause 18.1, providing, amongst other things, that no party may assign any of its rights under the 2010 SHA without the prior written consent of all the parties (such consent not to be unreasonably conditioned, withheld or delayed);

v) Clause 19.1, providing that a variation of the 2010 SHA shall be in writing and signed by or on behalf of all parties;

vi) Clause 19.2, providing that a waiver of any right under the 2010 SHA is only effective if it is in writing and it applies only to the person to which the waiver is addressed and in the circumstances for which it is given; and

vii) Clause 22.2, providing that each party shall at all times act in good faith towards the other and shall use all reasonable endeavours to ensure the 2010 SHA is observed.

The Fitzpatrick Parties' case

180. The Fitzpatrick Parties recognise that the transfer of Ordinary shares effected by Camelot to the FFDS in 2014 did not fall within Article 5.3 because Mr Fitzpatrick was not the settlor of the Nisma Settlement. However, it is their case that the transfer was approved by the holder of the majority of the Ordinary shares (excluding Camelot) , i.e. by Mr Crocker, and thus fell within Article 5.4, meaning that there was no breach of Article 6.1 et seq in respect thereof. As to such approval, reliance is placed upon the matters alleged to have been agreed between Mr Fitzpatrick and Mr Crocker in the conversations that are alleged to have taken place between September and November 2013, prior to Mr Coventry emailing Mr Bateson on 26 November 2013 to say that the FFDS was now in a position to complete the purchase of the relevant shares. Article 5.4 did not provide for approval thereunder to be in writing.

181. So far as the transfer of Preference shares are concerned, which pursuant to Article 6.10 required to be approved by Mr Crocker in writing, it is, as understood, the Fitzpatrick Parties' case that Mr Crocker is estopped from taking any point as to absence of writing, and/or has waived his right to do so.

182. Further, and in any event, the Fitzpatrick Parties rely upon written approval having been given by Mr Crocker to the transfer of the Ordinary shares and Preference shares to FFDS by his signing share certificates in the name of FFDS in relation to the relevant shares, having, before doing so, seen the relevant transfers setting out the consideration paid by the FFDS. Further, reliance is placed on the registration of FFDS, and subsequently Mrs Powell, as holder of the relevant Ordinary and Preference shares in the Company's register of members, it having been recognised that the registration in the name of FFDS was incorrect, and required correction to the name of one or more of the Fitzpatrick Trustees – see s. 126 CA 2006 and *J Sainsbury plc v O'Connor* [1991] 1 WLR 963. The correction was made when Mrs Powell was, on 18 April 2020, registered in the Company's register of members as the holder of the relevant shares.

183. The Fitzpatrick Parties therefore seek a declaration that the relevant shares have been validly transferred by Camelot to FFDS/the Fitzpatrick Trustees, and they resist any suggestion that the Company's register of members ought to be rectified so as to delete Mrs Powell's registration as the holder of the relevant shares on 18 April 2020.

184. So far as the 2010 SHA is concerned, the gist of the Fitzpatrick Parties' case is that the conversations that took place between Mr Fitzpatrick and Mr Crocker between September and November 2013 extended to Mr Fitzpatrick not only seeking Mr Crocker's consent or approval to the transfer of the shares, but also to the FFDS effectively stepping into Camelot's shoes so far as the terms of the 2010 SHA are concerned. It is submitted that Mr Crocker was aware that Mr Fitzpatrick placed particular importance upon the 2010 SHA and the terms thereof applying as between Mr Crocker and the FFDS following any transfer of shares, and that Mr Fitzpatrick, and through him Camelot and the FFDS, were placing reliance on Mr Crocker's consent or approval before proceeding. It is the Fitzpatrick Parties' case that the transfer of shares would not have proceeded had no such approval or consent been forthcoming because of the importance attached to the 2010 SHA.

185. Relying on the 2014 Deed of Assignment and the consent or approval alleged to have been given orally by Mr Crocker, the Fitzpatrick Parties had initially sought declarations as follows (as set out in the Fitzpatrick Trustees' Particulars of Claim):

> *"59.2. A declaration that the 2010 Shareholders' Agreement did not terminate on transfer of the Trust Shares from the Nisma Settlement to the Trust/Trustees;*
>
> *59.3. A declaration that Mr Crocker consented to the assignment of rights under the 2010 Shareholders' Agreement to the Trust/Trustees;*
>
> *59.4. A declaration that Mr Crocker is estopped from denying that there was a valid assignment of rights under the 2010 Shareholders' Agreement to the Trust/Trustees;*

59.5. A declaration that the rights under the 2010 Shareholders' Agreement have been validly assigned to the Trust/Trustees;

59.6. A declaration that the 2010 Shareholders' Agreement is binding and effective as between Mr Crocker and the Trust/Trustees."

186. However, it is now accepted by the Fitzpatrick Parties that there are difficulties with a case based upon an assignment of rights under the 2010 SHA entitling the Fitzpatrick Trustees to a declaration in the terms referred to in paragraph 59.6 of the Particulars of Claim, because such an assignment would not be effective to make the 2010 SHA binding and effective as between the FFDS and Mr Crocker. This is because the burden of a contract cannot be assigned – see e.g. *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103, per Lord Browne-Wilkinson.

187. This left the Fitzpatrick Parties' case in promissory estoppel as reflected in the declarations sought in paragraph 59.4 of the Particulars of Claim. As to this, the Fitzpatrick Parties rely upon the summary of the relevant principles in Spencer Bower, Reliance-Based Estoppel, 5th Ed, at para 1.18.

188. As to the application of those principles to the facts of the present case, the Fitzpatrick Parties rely upon a case that Mr Crocker clearly and unequivocally represented during the course of the conversations that took place between September and November 2013 between himself and Mr Fitzpatrick that he approved or consented to, or at the very least did not object to the FFDS stepping into the shoes of Camelot/the Nisma Settlement so far as the latter's shareholdings in the Company were concerned, and also as regards the terms of the 2010 SHA. It is said that in reliance on this, Camelot/the Nisma Settlement and the FFDS proceeded with the 2014 Transfer, and thereby changed their positions, such that it would be unconscionable for Mr Crocker to now object either to the transfer of shares to FFDS or to the latter having stepped into the shoes of Camelot so far as the 2010 SHA is concerned.

189. At the commencement of the trial, and pursuant to a formal application issued in good time prior to trial, the Fitzpatrick Trustees applied to amend their Particulars of Claim in order to include an alternative case in novation, a line of argument that had been included and developed in the Fitzpatrick Parties' Skeleton Argument for trial. The application was opposed, but for reasons given in an extempore judgment on the first day of the trial, I concluded that it was appropriate to grant permission to amend to allege that there had been a novation. In consequence, the Fitzpatrick Trustees now seek, in the alternative, the following declaration:

"59.5A Alternatively, a declaration that the provision of Mr Crocker's consent as pleaded at paragraphs 33, 41 and 44 above gave rise to a novation of the 2010 Shareholders Agreement on the same terms in favour of the Trustees and the Trust;"

190. Further, the declaration as sought by paragraph 59.6 of the Particulars of Claim was amended so that it should now be read as including the words *"as novated"* after *"2010 Shareholders' Agreement"*.

191. Novation involves a new contract between a continuing party and a new party, generally on the same terms as the pre-existing contract. The Fitzpatrick Parties recognise that the agreement or consent of the continuing party to such a new contract is required. However, so far as this is concerned, it is the Fitzpatrick Parties' case that:

i) Such agreement or consent can be in writing, oral or inferred from the continuing party's conduct which is to be judged objectively – see *Evans v SMG Television Ltd* [2003] EWHC 1423 (Ch); *Seakom Ltd v Knowledgepool Group Ltd* [2013] EWHC 4007 (Ch) at [145]-[147], and *Rolls-Royce Holdings Plc v Goodrich Corp* [2023] EWHC 1637 Comm at [34]-[35]. Novation can therefore be effected whether or not there was any understanding on the part of those involved that what was being effected was what the law calls a novation – *Evans* (supra) at [181] and [186];

ii) The continuing party may validly consent to a novation in advance - *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Bank Ltd* [2011] QB 943;

iii) Evidence of subsequent actions is admissible to establish whether there has been a novation by conduct - C*apita ATL Pension Trustees Ltd v Sedgwick Financial Services Ltd* [2016] EWHC 214 at [21] and *Credico Marketing Ltd v Lambert* [2021] EWHC 1504 (QB) at [216]; and

iv) So far as consideration for the new contract is concerned, the various promises between the parties to the novation agreement will generally be regarded as adequate consideration, and consideration was provided in this way in the present case.

192. The Fitzpatrick Parties recognise the existence and potential effect of the no oral modification provision in clause 19.1 of the 2010 Shareholders Agreement, and also the no oral waiver provision in clause 19.2. However, they rely upon the decision of the Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119 at [16], per Lord Sumption, as authority for the proposition that whilst no oral modification provisions may be effective, there may be circumstances where a contracting party is precluded by conduct from relying on such contractual restrictions by virtue of estoppel, provided there have been words or conduct which unequivocally represented that the subject transaction was valid *notwithstanding* a failure to comply with stipulated formality e.g. by way of waiver or deemed consent. The Fitzpatrick Parties submit that the present case is such a case.

193. However, more fundamentally, if there has been a novation, the Fitzpatrick Parties submit that, as a matter of true construction thereof, clause 19.1 does not extend thereto. This is on the basis that a novation involves entry into a new contract rather than a variation of the old contract – see e.g. *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2023] EWCA Civ 128 at [82], per Falk LJ.

194. The latter case recognises that a provision such as clause 19.2 may have rather different effect to a provision such as clause 19.1, but it is the Fitzpatrick Parties' case that, even if it is capable of application to a novation, which they would say it is not, Mr Crocker is either estopped from relying upon the same, or has waived his right to do so – see e.g. *Musst Holdings* (supra) at [84]-[88].

195. In their Skeleton Opening Argument, the Fitzpatrick Parties described waiver by estoppel as being similar in nature and similarly broad to promissory estoppel, although they submit by reference to *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd* [2009] EWCA 1108 at [51]-[60] that its focus is not on the actual making of a deliberate choice, but rather on a party acting in such a way that it is fair to treat them as having made a deliberate choice to waive. They submit that this is a crucial feature of waiver by estoppel as a party can waive rights without knowing they have a right to waive. Thus, so it is further submitted, if a reasonable person would have understood a waiving party to have intended to waive their rights then, provided the other elements required are present, a waiver will have taken place even if the waiving party did not intend to waive, nor even knew they had a right to waive.

196. As to estoppel and waiver, apart from any agreement or representations on the part of Mr Crocker during the course of the discussions between himself and Mr Fitzpatrick between September and November 2013, reliance is placed by the Fitzpatrick Parties upon, amongst other things, the fact that Mr Crocker accepted the FFDS as a shareholder in respect of the relevant Ordinary shares and Preferential shares by the issue of a share certificate signed by Mr Crocker and Mr Fortune in respect thereof in circumstances in which Mr Crocker was aware of the importance attached to the 2010 SHA, and in which Mr Crocker was aware from the relevant stock transfer forms as to the consideration paid. Further, reliance is placed upon subsequent conduct whereby the parties acted by reference to the 2010 SHA, including in respect of their deliberations in respect of Adventure Golf and the Non-Golf Turnover Rent that I have referred to above.

197. The Fitzpatrick Parties emphatically deny any suggestion that Mr Fitzpatrick has perpetrated a fraud (by deceit) upon Mr Crocker by misrepresenting that the Nisma Settlement was his family trust (or a family trust of his and Mr Keaney) and that the 2014 Transfer was therefore a simple transfer from his offshore trust to his onshore English trust, the FFDS (and thus a permitted transfer under Article 5.3 of the 2010 Articles). It is their case that Mr Crocker was made aware of Mr Murray's true role and involvement in respect of the Nisma Settlement, and that, in any event, Mr Crocker is unable to show that Mr Fitzpatrick made any representation to Mr Crocker knowing the same to be false, or being reckless in that respect, that might have induced Mr Crocker to approve, consent to, or at least not object to the transfer of shares to the FFDS by the 2014 Transfer, or to the FFDS stepping into the shoes of Camelot/the Nisma Settlement so far as the 2010 SHA is concerned.

198. Further, the Fitzpatrick Parties deny any suggestion that there was any breach of clause 22.2 of the 2010 SHA and the obligation of each party to the 2010 SHA to act in good faith to the other, whether by Camelot (by Mr Fitzpatrick acting as agent on its behalf) failing to disclose the true position in respect of Mr Murray or that the transfer of shares to the FFDS was not a permitted transfer or otherwise, so as to enable Mr Crocker to treat the counterparty to the 2010 SHA as being in repudiatory breach of contract. Further, it is denied that Mr Fitzpatrick acted in breach of his fiduciary duties to the Company by failing to disclose the true position to Mr Crocker.

199. In addition to the declaratory relief referred to above, the Fitzpatrick Trustees seek an injunction restraining Mr Crocker from acting contrary to the 2010 SHA, or otherwise acting in breach of its terms. It is fair to say that I was not addressed upon this during the course of the trial, and I do not propose to comment further upon this head of relief.

Mr Crocker's case

200. Mr Crocker denies that the Fitzpatrick Trustees are entitled to the declaratory relief that they seek.

201. By his Counterclaim, Mr Crocker seek declarations to the effect that:

i) The Fitzpatrick Trustees are not parties to the 2010 SHA and are not entitled to rely upon the terms of the same;

ii) The 2010 SHA terminated upon Camelot ceasing to hold shares in the Company; alternatively,

iii) The 2010 SHA terminated upon Mr Crocker accepting repudiatory breaches by Camelot of the 2010 SHA;

iv) The purported transfer of Ordinary shares from the Nisma Settlement (Camelot) to the FFDS was in breach of the pre-emption provisions in the 2010 Articles and of no effect;

v) The purported transfer of the Preference shares from the Nisma Settlement (or Camelot) to the FFDS was in breach of the provisions of the 2010 Articles of Association and void and of no effect;

vi) The Fitzpatrick Trustees are not entitled to be registered as members of the Company.

202. By his Part 20 Claim against Camelot and Mr Fitzpatrick, Mr Crocker seeks the following relief:

> *"1. a declaration that the 2014 Transfer is void;*
>
> *2. a declaration that the 2010 SHA has been fundamentally breached, which constitutes a repudiatory breach, and is therefore void;*
>
> *3. for Camelot to send a transfer notice to the Part 20 Claimant in respect of the ordinary shares in PPGC that it holds for the purchase price of £10,000 in accordance with the provisions of the 2010 Articles;*
>
> *4. upon payment of £10,000 from the Part 20 Claimant, the transfer by Camelot of the ordinary shares to the Part 20 Claimant;*
>
> *5. damages;*
>
> *6. costs; and,*
>
> *7. interest."*

203. The essence of Mr Crocker's case that the Court should refuse the Fitzpatrick Trustees the declaratory relief that they seek, and grant Mr Crocker the declaratory and other relief that he seeks is as follows:

204. So far as the 2014 Transfer is concerned, and the entitlement of Mrs Powell to be registered as a member of the Company in respect of the relevant shares on behalf of the FFDS, Mr Crocker's case is, in essence, as follows:

i) The transfer of the Ordinary shares from Camelot (as trustee of the Nisma Settlement) to the Fitzpatrick Trustees was subject to pre-emption provisions in the 2010 Articles (Clause 6.1 to clause 6.9) as referred to above. The transfer was not permitted by Article 5.3 for reasons accepted by the Fitzpatrick Parties (no common settlor between the Nisma Settlement and the FFS), and it was not permitted by article 5.4 because Mr Crocker did not approve it. Consequently, the transfer was in breach of the pre-emption provisions.

ii) The transfer of the Preference shares was made in breach of the provision in the 2010 Articles (clause 6.10) that a *"Preference Shareholder may only transfer Preference Shares with the prior written consent of all other Preference Shareholders"*, because there was no such written consent.

iii) Further, and in any event, the 2014 Transfer was procured by fraudulent misrepresentations by Mr Fitzpatrick that the Nisma Settlement was his family trust and that it was a simple transfer from his offshore trust to his onshore English trust, the FFDS, and was thus a permitted transfer under Article 5.3 of the 2010 Articles, when the real position, which is said only to have been discovered when the Particulars of Claim were served, is that Mr Fitzpatrick was not the settlor. Reliance is placed by Mr Crocker on the fact that, in the Particulars of Claim, it is alleged that the settlor of the Nisma Settlement was Mr Murray and not Mr Fitzpatrick, and that this has remained Mr Fitzpatrick's position, and that of the Fitzpatrick Trustees, during the course of the proceedings including the trial.

iv) Any assent by Mr Crocker to the 2014 Transfer was given when Mr Crocker was called by Mr Fitzpatrick, and when, during a short telephone conversation in which Mr Fitzpatrick said either that the shares were going to be transferred, or had been transferred, Mr Crocker said words along the lines of "*[Sean] they are your shares you can do what you like with them*".

v) Had Mr Crocker been told the truth that the Nisma Settlement was not Mr Fitzpatrick's family trust, he would have taken legal advice in 2014 and been informed of his pre-emption rights to buy 50% of the Company for a mere £10,000 (in respect of the voting Ordinary shares). It is Mr Crocker's case, as is said to have been accepted by Mrs Powell under cross examination, that a binding contract as between Camelot (as trustee of the Nisma Settlement) and the Fitzpatrick Trustees had been concluded by the correspondence in August 2013 between Mr Coventry and Mr Bateson, the effect of which was, in itself, to place Camelot in breach of Article 6.1 by not serving a Transfer Notice prior to concluding such agreement.

vi) Mr Crocker is entitled to complain that he was not made aware that the transfer by Camelot of its shares to FFDS in 2014 circumvented his pre-emption rights to pay £10,000 for 50% of the Ordinary shares in the Company. It is alleged on behalf of Mr Crocker that not only did Mr Fitzpatrick (on behalf of Camelot) have a duty pursuant to clause 22.2 of the 2010 SHA to tell Mr Crocker the true position in respect of Mr Murray and as to whether the transfer was a permitted transfer, but Mr Fitzpatrick owed fiduciary duties to the Company to the same effect.

vii) The purported transfer of shares by Camelot to the FFDS effected by the 2014 Transfer was other than in accordance with the provisions of the 2010 Articles and is therefore void and of no effect pursuant to Clause 6.9 thereof.

205. So far as the 2010 SHA is concerned, it is Mr Crocker's case that the 2014 Deed of Assignment does not assist the Fitzpatrick Parties because, as now accepted by them, the latter cannot have been effective to assign the burden of the 2010 SHA, so as to bind Mr Crocker thereto. Further, if the 2014 Transfer to the FFDS was, contrary to Mr Crocker's case that the same was void and ineffective, valid and effective, then that will have served to terminate the 2010 SHA in any event pursuant to clause 13.1(a) thereof.

206. Further, on the facts, given the limited nature of the discussion between Mr Fitzpatrick and Mr Crocker with regard to the transfer of the shares, and as a matter of law, there cannot have been any novation, estoppel or waiver.

207. To the extent that the pre-transfer discussions between Mr Fitzpatrick and Mr Crocker were more extensive than Mr Crocker accepts, then, as understood, Mr Crocker's case is that he is entitled to rely upon the non-assignment, no oral variation, and no oral waiver provisions in clauses 18.1, 19.1 and 19.2 of the 2010 SHA, and that having due regard to the approach that the Courts have taken in respect of attempts to get around such provisions by reference to estoppel or waiver, there is simply insufficient on the facts to lead to the conclusion that these provisions ought to be disregarded.

208. In the circumstances, it is Mr Crocker's case that he is entitled to the relief that he seeks by his Counterclaim and by his Part 20 Claim. The effect of this would be to defeat the interest of the Fitzpatrick Trustees, and thus the FFDS, in the share capital of the Company.

WITNESSES AND EVIDENCE

Introduction

209. The Fitzpatrick Parties called Mr Fitzpatrick, Mrs Powell and Mr Preedy. It is submitted on behalf of Mr Crocker that adverse inferences ought to be drawn from the fact that the Fitzpatrick Parties did not call Mr Keaney, Mr Bateson or Mr Bertram.

210. Mr Crocker called himself, Mrs Boyes and Mr Fortune. It is submitted on behalf of the Fitzpatrick Parties that adverse inferences ought to be drawn from the fact that Mr Crocker did not call Mr Boyes.

Approach to the evidence

211. An important consideration in the present case is that significant events took place some 30 years ago, when the Company was incorporated, and investments were made therein that led to shares being transferred and allotted to Camelot as trustee of the Nisma Settlement. Even the key disputed 2014 Transfer of shares by Camelot to the FFDS took place some 10 years ago. There are very significant disputes of fact between the parties that require to be resolved, and it is important to address how the Court should go about this, and for consideration to be given to the effect that the passage of time may have had on recollections.

212. Given the passage of time since the events in question it is important for me to have regard to the much repeated observations of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15] – [22] with regard to the unreliability of memory, and his caution, expressed at [22], to place limited, if any, weight on witnesses' recollections, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

213. In the circumstances of the present case, I consider it helpful to set out in more detail how Leggatt J described the process by which memories might become distorted by the passage of time as a witness subconsciously reconstructs events in their own mind leading to, amongst other things, the giving of honestly held, but false evidence. At [15]-[21], Leggatt J said this:

> *"15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.*
>
> *16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
>
> *17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an*

experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based

> *increasingly on this material and later interpretations of it rather than on the original experience of the events.*
>
> *21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strengt*h, vividness is not a reliable measure of their truth. "

214. I have emphasised in the above passage observations that I consider to be particularly relevant for present purposes.

215. Mr Zaman KC and Mr Heylin, on behalf of Mr Crocker, draw my attention to the observations made as to the importance of contemporaneous documents by Males LJ in *Simetra Global Assets Limited v Ikon Finance Limited* [2019] EWCA Civ 1413 at [48] *reinforcing what was said by Leggatt J in Gestmin:*

> *"48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents."*

216. In addition to documentary evidence, it is plainly appropriate to test the witness evidence against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions – see *Kimathi v The FCO* [2018] EWHC 2066 (QB), at [98].

217. The established approach to fact-finding thus requires the reliable contemporaneous documentary evidence to be used as a platform, to which are added known or established facts, agreed facts, or probable facts (both inherently probable and by inferences properly drawn from known, established or agreed facts), which the Court will then build upon by reference to witness testimony which is consistent or compatible with that underlying body of reliable documentary evidence and is not tainted or flawed by other indicators of unreliability – see e.g. *Re Parsonage (deceased)* [2019] EWHC 2362 (Ch), per HHJ Simon Barker QC at [32]-[37].

218. I also bear in mind that where a serious allegation is made in a civil case, such as an allegation fraud or dishonesty, the burden remains the same, and the standard of proof remains the civil standard. However, if a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged, at least to the extent that it is incumbent on the party making the serious allegation to prove it. This is on the basis that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability – see Phipson on Evidence, 20th Ed, at 6-57 and *H (Minors)* [1996] AC 563 at 586D-F, per Lord Nicholls.

219. Each side has sought to suggest that because witnesses who might have been expected to be called to support the case of the other party have not been called, it is appropriate for the Court to draw adverse inferences. The correct approach to drawing adverse inferences in such circumstances is now, I consider, to be taken to that as considered by the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] 1 WLR 3863. At [41], per Lord Leggatt expressed the position as follows:

> *"So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."*

<u>The Fitzpatrick Parties' witnesses</u>

Mr Fitzpatrick

220. Mr Fitzpatrick is now aged 79 and would have been in his late 40s/early 50s when he first met Mr Crocker in or around 1993. He has clearly had great success in the construction and civil engineering business, operating businesses with a multi-million pound turnover. He came across as robust, streetwise and wily, knowing his own mind and as someone who did not suffer fools gladly. I consider that something of an insight into the dynamics of his relationship with Mr Crocker is provided by remarks made by Mark Smith in a letter dated 21 May 2007 when he referred to Mr Fitzpatrick grinding Mr Crocker down until he got his own way in relation to a particular matter, and to Mr Fitzpatrick playing on the dynamics of their personalities: *"as you say in business he has a bullying nature and you come from the other end and don't particularly like confrontation*." I consider that the characterisation of Mr Fitzpatrick as a *"bully"* may be unfair, but this does provide some insight as to the nature of the relationship.

221. Mr Fitzpatrick gave clear and forthright evidence on important issues in the case such as the involvement of Mr Murray in the Nisma Settlement, and his discussions with Mr Crocker in the lead up to the transfer of shares to the FFDS. However, there were other aspects of his evidence where he had a tendency to be evasive, or to seek to avoid the issue, in particular in relation to sensitive matters. An example is the somewhat opaque nature of the involvement of Mr Keaney in VGC and other enterprises. It had to be teased out of Mr Fitzpatrick that Mr Keaney had been bankrupt and/or disqualified from acting as a director, and that this was the explanation for his shadow role in these activities, it emerging that Mr Keaney was treated as between himself and Mr Fitzpatrick as 50% beneficial owner of the relevant enterprises. Further, Mr Fitzpatrick was somewhat vague as to the claims that Mr Keaney had made on or in respect of the Nisma Settlement as evidenced by Mr Coventry's memorandum dated 2 July 2009 and did not, as I see it, satisfactorily explain his email to Mr Coventry dated 24 September 2010, and the accompanying manuscript agreement signed by himself and Mr Keaney. He said that no further monies were paid to Mr Keaney, but Mr Keaney resigned as director of the Company very shortly thereafter.

222. Further as to Mr Fitzpatrick's credibility, I do have very real concerns regarding whether there was a genuine commercial purpose behind Mr Murray's involvement with the Nisma Settlement, and thus the Company, and therefore as to the veracity of Mr Fitzpatrick's evidence in respect thereof, which concerns cannot, I consider, be explained away simply on the basis of inaccurate recollection given the significant passage of time. Of course, the fact that Mr Fitzpatrick may have given false evidence in respect of these matters does not mean that I should necessarily reject his evidence on other matters, such as the conversations that he claims to have had with Mr Crocker prior to the transfer of shares to the FFDS. However, I do consider that this, coupled with Mr Fitzpatrick's somewhat evasive evidence in relation to other matters, such as the relationship with Mr Keaney, does require that I should treat his evidence with a great deal of caution, and that I should not accept it unless supported by other corroborative evidence, such as contemporaneous documentary evidence or evidence of other reliable witnesses, or the inherent probabilities of the situation.

Mrs Powell

223. Mr Fitzpatrick's daughter, Mrs Powell, is a Solicitor whose experience has been in corporate law, having qualified in 2007. She latterly worked for Gately LLP between 2012 and 2016, since when she has been primary carer for her two children.

224. Whilst it important not to place undue emphasis on demeanour, she came across to me as an honest and straightforward witness doing her best to assist the Court. I was particularly impressed that she was not prepared to simply go along with what her father might have said in evidence, an example of which was provided in relation to evidence that Mr Fitzpatrick gave to the effect that there had been a meeting with the Fitzpatrick Trustees ahead of his discussions with Mr Crocker in respect of the transfer of shares to the FFDS. Mrs Powell did not seek to support this, or obfuscate in relation to it, but was clear that there had been no such meeting, and that the first meeting of Mr Fitzpatrick with the Fitzpatrick Trustees was in May 2014.

225. In paragraph 18 of her witness statement, Mrs Powell said that she specifically remembered her father telling her that he had discussed the transfer of shares to the FFDS and the 2010 SHA with Mr Crocker on a number of occasions. In the course of

her oral evidence under cross examination, Mrs Powell expanded upon this by explaining, as I have already mentioned, that, at the relevant time, she would travel down with Mr Fitzpatrick from his home in Hillingdon to the golf course at Pedham Place Farm for board meetings, and that they had discussions in relation thereto during the course of the journey lasting some 90 minutes each way. I found this evidence to be particularly credible notwithstanding the passage of time since late 2013. I do, however, take into account the possibility that Mrs Powell might simply have honestly misremembered what she was told by her father over 10 years ago.

Mr Preedy

226. Mr Preedy was clearly an honest witness doing his best to assist the Court. However, realistically, in respect of the manuscript note taken of the board meeting on 12 May 1997, he could do little more than confirm that he made the manuscript note, and that there were then outstanding issues so far as the shareholding was concerned. So far as the manuscript note is concerned, I do regard it as significant that he has noted down Mr Murray's name in the context of the discussion concerning the Nisma Settlement, and where Mr Preedy had also noted being advised that the shares presently in the name of VGC should be in the name of *"Nisma Settlement"*.

Missing witnesses

227. As I mentioned, I am invited on behalf of Mr Crocker to draw adverse inferences against the Fitzpatrick Parties as a result of what is said to be a failure to call Mr Bateson, Mr Bertram and Mr Keaney. This issue having been flagged up in Mr Crocker's trial Skeleton Argument, it was responded to by JMW in a letter dated 22 April 2024.

228. The Court necessarily is required to apply the approach described by Lord Leggatt in *Efobi* (supra) referred to in paragraph 219 above.

229. So far as Mr Bateson is concerned, JMW having in their letter dated 22 April 2024 described Mr Bateson's involvement in the salient issues as being *"limited"*, referred to having met with him at the outset of the litigation, and to his recollection of any facts relating to relevant matters being very poor and unreliable, with the consequence that no further attempt was made to take a statement from him. I can see that Mr Bateson might potentially have been able to assist with regard to such matters as his contact with Mr Murray, and how the *"off-the-shelf"* discretionary settlements that he promoted operated in practice. However, I accept that his evidence is likely to be unreliable after this length of time, and that he is unlikely to have been able to provide any real assistance in relation to the key matters in issue in the present case. Consequently, I do not consider it appropriate to draw any adverse inferences so far as he is concerned.

230. JMW say that they did not even attempt to approach Mr Bertram. I do not consider this to be an unreasonable approach in the circumstances given that his role seems to have been very limited indeed, and anything that he might have to say is highly likely to be unreliable after this length of time. Consequently, I do not draw any adverse inferences so far as he is concerned.

231. So far as Mr Keaney is concerned, JMW suggest that he played only *a "peripheral role in respect of matters relevant to the substantive issues in dispute"*. JMW go on to say that … *"his recollection of events is also limited and poor. Further we understand that*

he has been ill for many years with a heart condition (he retired in 2009), he is now in his 80s and has a full-time carer for his housebound wife who is also suffering from a long-term illness."

232. Given that Mr Keaney was, on the basis of Mr Fitzpatrick's evidence, a *"partner"* together with Mr Fitzpatrick in his business ventures, I find it difficult to accept that Mr Keaney can properly be described as having played a *"peripheral"* role, particularly bearing in mind his apparent claims upon the Nisma Settlement. But for his age, infirmity and the passage of time, one might have expected him to be able to provide helpful evidence, not least on the role (if any) played by Mr Murray in introducing the opportunity to participate in the development of the golf course at Pedham Place Farm, and to earn monies from tipping thereupon, as well as the role (if any) subsequently played by Mr Murray in financing the venture, and the basis upon which he (Mr Murray) might have considered that he had a claim upon the Nisma Settlement. One might ordinarily have expected there to have been at least a statement from him dealing with these and other matters as best he could.

233. Ultimately, as will be apparent, I do not consider that the case turns on the issues that Mr Keaney might have been able to assist on. Further, given his age, infirmity and the passage of time, one can perhaps understand why he was not troubled to assist by providing a witness statement. Nevertheless, I do consider that it is appropriate to draw adverse inferences in respect of the issues that I have identified above from the absence of even a witness statement from him. However, given the circumstances, I consider that those inferences must be very limited.

234. I consider that Mr Coventry is likely to have made a very important and helpful witness. However, unfortunately, he is now dead.

Mr Crocker's witnesses

Mr Fortune

235. I will begin my consideration of Mr Crocker's witnesses with Mr Fortune, in that I consider that his evidence provides a paradigm example of the effect of the passage of time on recollection.

236. I am in no doubt that Mr Fortune, who is now some 92 years of age, was an honest and truthful witness doing his best to assist the Court. It was suggested that he was not to be regarded as an independent witness because he had aligned himself with Mr Crocker in relation to a number of issues and had been identified as secretly a *"Crocker"* in Mr Boyes' email dated 18 March 2020. Indeed, Mr Maynard-Connor KC went so far, one stage, to suggest that Mr Fortune had been party to some form of dishonest conspiracy to present a false narrative at the board meeting on 2 June 2020, although ultimately the allegation of deception made against Mr Fortune was limited to a suggestion that he had been party to deceiving Mr Fitzpatrick and Mrs Powell into believing that he was independent ahead of the meeting to consider the appointment of Mr Boyes as a director. I am satisfied that these criticisms are entirely misplaced. As Mr Fortune explained, in a sense he felt that his loyalties lay with Mr Crocker because he had initially worked for Mr Crocker, and one suspects that Mr Crocker's non-confrontational nature was more appealing to Mr Fortune than that of Mr Fitzpatrick. In this sense, his allegiances may

have lay with Mr Crocker. However, I did not consider that that tainted his evidence in any way.

237. The real difficulty with Mr Fortune was that his evidence as to past events, in contrast to more recent events, was I consider unreliable as demonstrated by the fact that he, in a number of respects, gave very clear and firm evidence in respect of a number of matters which could be demonstrated by the documents to be incorrect. Thus, for example:

i) In paragraph 24 of his witness statement, he referred to Mr Fitzpatrick becoming a shareholder, although when shown a copy of the 1994 SSA, he unhesitatingly accepted that he had made a mistake in this respect;

ii) In paragraphs 44 and 45 of his witness statement, he asserted that he did not recall any mention of Camelot apart from at the board meeting on 24 May 2010. However, under cross examination he was constrained to accept that Camelot must have been mentioned on other occasions, not least because he was a party, along with Camelot, to the 1998 SHA.

iii) Further, in the same vein, he talked in terms of selling his shares to Mr Fitzpatrick, although it is clear from the relevant documentation that he sold the same to Camelot, although he remained insistent that he had been paid by cheque by Mr Fitzpatrick.

238. In the circumstances, I consider that very limited weight should be attached to Mr Fortune's evidence as to the events dating back to 1994, the incorporation of the Company, and any involvement of Mr Murray at that time. Consequently, I do not attach any significant weight to Mr Fortune's evidence as to Mr Murray's involvement, or rather lack of involvement, in the Company, particularly bearing in mind the role that Mr Fitzpatrick clearly played in acting on behalf of the interests of the Nisma Settlement over the years, and the role played by Mr Fitzpatrick in the Company as further explained below.

239. Mr Fortune does, in paragraph 43 of his witness statement, say that he remembers that *"in or around 2014"*, Mr Fitzpatrick mentioned at a board meeting the transfer of shares from the Nisma Settlement to the FFDS, although he says that he thinks that it was just a question of Mr Fitzpatrick saying that was what he was going to do, and that he was just informing the board. Although it is now over 10 years since Mr Fitzpatrick might have mentioned at a board meeting the proposed transfer of shares, I consider this recollection to be more likely to be correct than incorrect, at least the extent that Mr Fortune recalls Mr Fitzpatrick mentioning the proposed transfer, although his recollection as to the detail is, I consider, likely to be less reliable.

Mr Crocker

240. Mr Crocker is now 73 years old. He is a very different witness and character to Mr Fitzpatrick, being someone who, as other witnesses have observed, eschews confrontation. I gained the impression from his evidence that he is someone of limited business acumen or commercial drive, as intimated by Mrs Boyes in evidence when she spoke in terms of herself and her father being up against Mr Fitzpatrick and Mrs Powell, hence their reliance upon Mr Boyes and his supposed business acumen. Consistent with

this, in addition to the reliance that Mr Crocker has clearly placed on assistance from Mr Boyes in recent years, I gained the impression from the evidence that Mr Crocker was significantly dependent upon advice and guidance from his more business savvy father, not only in the early years, but until relatively close to his father's death in 2016.

241. I also gained the impression from Mr Crocker's evidence that he struggled with basic concepts in relation to the operation of the Company. Thus, for example, he was asked at one point in his cross examination with regard to the nomination by himself and Camelot of directors pursuant to the terms of the 2010 SHA, and he really did not seem to get the point as to the significance of the provisions in the 2010 SHA concerning the composition of the board and the concept of *"JC Directors"* and *"Nisma Directors"* as provided by clause 3 thereof. A further example is in relation to the *"nuclear routes"* that Mr Boyes had referred to in his email to Mr Church dated 26 October 2018. Mr Crocker was asked about these *"nuclear routes"*, but was only able to identify one of those mentioned by Mr Boyes in his email. One interpretation is that he was being evasive, declining to answer the question even though he knew the answer. However, I gained the impression that he either did not genuinely recall, or more likely simply did not get the concepts involved. A yet further example is provided by the answers that he gave to questions that were put to him regarding his Disclosure Certificate, and whether he could honestly have signed the same knowing that the relevant documents had been collated by Mr and Mrs Boyes. Again, I gained the impression that he really did not get the point.

242. In somewhat similar vein is, I consider, how Mr Crocker responded to the questions put to him by Mr Maynard-Connor KC in respect of Mr Boyes's email dated 18 March 2020 in which he had referred to Mr Fortune being *"secretly a "Crocker"*. He appeared, in the exchange referred to in paragraph 153 above, to accept that he had intended to deceive Mr Fitzpatrick and Mrs Powell in relation to Mr Fortune's independence. Ultimately, his response was *"Well, I didn't see it like that"*, and I have to say that I find it difficult to accept that Mr Crocker ever thought at the time that he might have been deceiving or misleading Mr Fitzpatrick or Mrs Powell. Nevertheless, he got himself in a twist on the point.

243. As with Mr Fortune, Mr Crocker's evidence demonstrates the unreliability of memory given the passage of time. An example of such unreliability in the case of Mr Crocker is, I consider, provided by his evidence as to his encounter with Mr Murray, sometime in 1996 he says. He accepts that Mr Murray attended at the golf course at Pedham Place Farm but says that he has a recollection of Mr Murray essentially brushing past him without there being any communication between them at all. I have to say that this strikes me as highly improbable in that, surely, there would have been at least some welcome or introduction, and explanation as to why Mr Murray was at the golf club. Yet Mr Crocker claims to have a clear recollection to the contrary. One explanation is that Mr Crocker is lying, but another, and what I consider to be the more likely explanation, is that he has simply misremembered the detail of an encounter with Mr Murray nearly 30 years ago.

244. It is unquestionably a feature of Mr Crocker's case, consistent with Mr Crocker's reliance on others, that Mr Boyes has played a significant strategic role in how it has developed. It is reasonably clear that the nub of the dispute between the parties has arisen since the possibility of the profitable exploitation of Pedham Place Farm for housing development has come to the fore, a key consideration so far as this is

concerned being that if Mr Crocker, as freehold owner, could clear off the Company's lease, or gain control of the Company, then the pickings for him would be very significantly greater. It is, I consider, clear from the correspondence from Mr Boyes that I have seen, and his reference to, for example, *"grand plan"* (20 February 2018), *"nuclear routes"* (26 October 2018) and *"Brain Dump"* (18 April 2020), coupled with the characteristics of Mr Crocker that I have described, that Mr Boyes is playing a significant role in driving an agenda to this effect, if not masterminding it. The point is further brought out by Mr Boyes' briefing ahead of the board meeting on 10 December 2018 provided by his email dated 9 December 2018, and the *"Cheat Sheet"* prepared ahead of the board meeting on 2 June 2020.

245. Mrs Boyes spoke of her husband's business acumen and experience, which is no doubt of considerable assistance to Mr Crocker given what I consider to be his own limitations. This assistance may all be entirely proper and appropriate, but I do consider Mr Boyes' involvement to be tainted by his attempts to mislead by the inclusion of a false clause in the copy of the Gladman Deed provided to Mrs Powell, and his somewhat disingenuous comment, 15:08 minutes into the board meeting on 2 June 2020, when he suggested that he had not seen a *"huge amount"* of the 2010 SHA when he had already clearly considered the same in some detail as demonstrated by his reference to specific provisions in, for example, his email dated 9 December 2018.

246. Against the background of Mr Crocker's character and disposition, the passage of time, and the involvement of Mr Boyes in at least shaping an agenda to minimise or extinguish the effect of the Company's lease on the ability of Mr Crocker, as freeholder, to exploit the development opportunity at Pedham Place Farm, I have a real concern that this is one of those cases where even if Mr Crocker is, in his witness statement and in the witness box, saying what he believes to be true, his evidence has become tainted by what Leggatt J flagged up in *Gestmin* at [18] when he spoke of studies showing memory to be particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

247. Having seen Mr Crocker in the witness box over a number of days, and considered his evidence with some care, I am not persuaded that he was necessarily lying or presenting a story to the Court that he knew to be false. However, in light of the considerations that I have identified above, I do consider that I should regard his evidence of historic events to be inherently unreliable, at least unless supported by the documentary evidence, or corroboratory evidence from a reliable witness.

248. In this case, each side has sought to suggest that the other must be lying in respect of the key issues. However, as I shall go on to explain, in relation to the issues that I consider to be central to the dispute, I do not consider this necessarily to be the case.

Mrs Boyes

249. Despite the criticisms of her as a witness, Mrs Boyes came across to me as an honest witness doing her best to assist the Court in circumstances in which she clearly had a great deal of loyalty to her father. She may have been somewhat cagey regarding her intervention at 12:07 minutes into the meeting on 2 June 2020, the *"Cheat Sheet"* prepared for this meeting and about what Mr Crocker had said thereat, but I did not detect any deliberate attempt by her to mislead the Court.

250. Mrs Boyes did speak in terms of understanding that Mr Fitzpatrick had had shares in the Company, and of the company being owned 50-50 by her father and Mr Fitzpatrick, and she said that she had not heard of Mr Murray before receipt of the Particulars of Claim. However, it is to be borne in mind that she was only in her early teens when the Company was incorporated, and by the time that she became involved, attending board meetings in 2012, Mr Fitzpatrick had, on any view, been the person in effective control of the Nisma Settlement for some three years since Mr Murray's death in 2009. In these circumstances, it is understandable how, from her perspective she may have come to regard Mr Fitzpatrick as synonymous with the Nisma Settlement and the shareholding held through Camelot.

Missing Witness

251. On behalf of the Fitzpatrick Parties, it is submitted that I should draw adverse inferences from a failure to call Mr Boyes as a witness, in particular to answer the case that was put to Mr Crocker and Mrs Boyes in cross examination that there had been a dishonest conspiracy to present a false narrative at the board meeting on 2 June 2020.

252. However, I consider a difficulty with this to be that the case as to false narrative at the board meeting on 2 June 2020 was largely derived from the disclosure of the *"Cheat Sheet"* and WhatsApp exchanges made during the course of the trial. Although the case as to Mr Boyes's role and involvement in driving Mr Crocker's case might have been apparent from earlier documentation so as to provide a basis for cross examination of Mr Crocker and Mrs Boyes, prior to the disclosure during the course of the trial that I have referred to, it had not been asserted as such that Mr Boyes had conspired to present a false narrative, and the criticism of him focussed on the false clause in the Gladman Deed. In these circumstances, I can understand why it might not have been thought necessary to obtain a statement from him for the purposes of the trial as he had not been involved in respect of the central issues in the case.

253. Mr Boyes's evidence might well have been helpful in explaining more recent events, including questions surrounding the meeting on 2 June 2020, and I have been reluctant to make adverse comments with regard to his involvement given that he has not had the opportunity to answer criticisms that have been made of him. However, in the circumstances, I do not consider that it would be appropriate to make adverse inferences against Mr Crocker because Mr Boyes has not been called as a witness.

Missing documents

254. Each side has sought to criticise the other for not disclosing documents that it is said ought to have been disclosed, or missing without what is said to be proper explanation. A number of specific documents are identified in paragraph 96 of Mr Crocker's Closing Submissions. I myself have had a particular concern about the absence of bank statements relating to the Nisma Settlement in particular. However, given the passage of time, the fact that a number of documents are likely to have been in the possession of third parties, and in the light of explanations that have been given, I am not persuaded that there is any credible evidence of deliberate suppression of documents that ought to lead me to the conclusion that adverse inferences ought to be drawn from their non-production.

255. I was also invited, on behalf of Mr Crocker, to draw adverse inferences from what are described as *"forged documents"*. The focus of the submission was on the letter dated 19 July 2012 from Camelot (Mr Bateson) to Abbots (Mr Coventry) purporting to enquire about parties willing to purchase Camelot's shares in the Company. It is said on behalf of Mr Crocker that this was created for a nefarious purpose, namely to create a false paper trail to show that there had been an open and transparent sale of the relevant shares when there was, truly, no such thing. As put in closing submissions: *"It was all set up to allow Mr Fitzpatrick to do as he wished with the shares, in the same way he did with the Nisma loan."*

256. It is clear that this document was created later than its date, as evidenced by the email dated 15 January 2013 that I have referred to above from Mr Bateson to Mr Coventry. However, there is no evidence that Mr Fitzpatrick had any involvement in the creation of the letter dated 19 July 2012, and I consider it relevant that the fact that discussions must have taken place between Mr Bateson and Mr Coventry along the lines of the letter dated 19 July 2012 is supported by the correspondence that took place after 19 July 2012 and before 15 January 2013 as referred to in paragraphs 95 and 96 above.

257. I consider that it needs to be remembered that purpose behind the transfer of shares from Camelot to the FFDS shares was, according to Mr Fitzpatrick, so that the shares in the Company could be held within a trust within the jurisdiction over which his daughters could exercise control as trustees. Further, there is the evidence that Camelot was, by the time of the 2014 Transfer, looking to wind down the Nisma Settlement for whatever reason. It is unclear why the transaction was structured as a sale, and why attempts were made to portray it as some form of disposition at arm's length. There may have been tax or other trust related administrative reasons for this.

258. However, I consider the contention that the sale effected by the 2014 Transfer was some sort of set-up, and that the letter dated 19 July 2012 was created to enable Mr Fitzpatrick to do as he wished with the relevant shares, to be misplaced. By this time, Mr Fitzpatrick was in a position to effectively control the Nisma Settlement, and it seems to me that how, as between the Nisma Settlement and the FFDS, the shares were transferred, i.e. by whether by way of sale or transfer for no consideration, was, of itself, of no relevance or concern to Mr Crocker.

DETERMINATION OF THE KEY FACTUAL DISPUTES

The Nisma Settlement and Mr Murray's involvement therein

259. The Nisma Settlement clearly existed having been established by Mr Bateson, as settlor, by the 1992 Nisma Deed, to be made available to clients as an *"off-the-shelf"* settlement. Further, it is not in dispute that Mr Murray existed, not least given that Mr Crocker accepts that he met him, various identification documentation, such as a copy of his passport, have been produced, as has a contemporaneous file note made by Mr Coventry recording Mr Coventry having spoken to Mr Murray along with Mr Fitzpatrick on 1 June 2009. Further, there is evidence of Mr Murray having *"acquired"* the Nisma Settlement in the form of Mr Murray's letter to Mr Coventry dated 20 February 1995, and the subsequent references to Mr Bateson and Mr Coventry, on various occasions, referring to Mr Murray as the *"true settlor"* and *"effective settlor"*. In respect of this, as already touched upon, I understand there to have been a process whereby Mr Bateson and Mr Bertram, and through them Camelot, as trustee of the Nisma Settlement, would

treat Mr Murray as having been the settlor of the Nisma Settlement, and, in practice, albeit subject to the ultimate discretion of Camelot, act on his wishes so far as the identification of beneficiaries was concerned. Further, there is clear evidence that Camelot went on to acquire shares in the Company as trustee for the Nisma Settlement, as latterly reflected by the 2010 SHA, and the transactions that took place on 24 May 2010.

260. Mr Murray's involvement with the Nisma Settlement is, as I see it, further evidenced by, amongst other things:

i) A letter to Bank of Ireland, Hounslow, dated 9 March 1998 signed by Mr Murray;

ii) Mr Murray having added his address in manuscript at the top of a letter to Allied Irish Bank dated 26 March 1990, and the identification documents sent by him to Allied Irish Bank at that time;

iii) The letter dated 7 May 2003 sent by Mr Murray to Mr Bateson responding to Mr Bateson's letter to Mr Fitzpatrick dated 14 April 2003 relating to the payment of monies by VGC to the Nisma Settlement in which he said that it represented money due to him and/or the Nisma Settlement from that company;

iv) The instructions sent to Geoffrey Zelin of Counsel on 14 November 2005, and what was said about the Nisma Settlement therein;

v) The Declaration signed by Mr Murray on 16 May 2007;

vi) Mr Coventry referring to Mr Murray as the *"effective settlor"* in a letter to Allied Irish Bank dated 18 May 2007.

261. The more difficult issue is as to whether there was a genuine commercial purpose behind the Nisma Settlement in circumstances in which it was used as a genuine vehicle by Mr Murray to advance his funds to the Company because Mr Fitzpatrick and VGC were not in a position to provide the funding that the Company required, as described by Mr Fitzpatrick in his evidence. Further, there is then the question as to whether Mr Murray did identify Pedham Place Farm as a development and tipping opportunity for which it was genuinely agreed that he would be paid a commission representing 10% of tipping turnover, or whether, alternatively, the Nisma Settlement was used as a mechanism to evade tax by allowing a significant part of the tipping income to be moved offshore into the Nisma Settlement under the guise of payment to Mr Murray of commission, in circumstances in which Mr Fitzpatrick, or at least members of his family, would be able to benefit as beneficiaries of the Nisma Settlement.

262. I have to say that as the evidence has emerged, I have developed a very real concern that the latter may well have been the true purpose of the Nisma Settlement for the reasons advanced by Mr Zaman KC and Mr Heylin on behalf of Mr Crocker, and that Mr Fitzpatrick has provided false explanations in relation thereto. I have already identified this as a reason as to why I should treat Mr Fitzpatrick's evidence with a great deal of caution (see paragraph 222 above).

263. The principal reasons for my concerns are the following:

i) The identification by Mr Murray of Pedham Place Farm as a development or tipping opportunity strikes me as improbable. Mr Murray, at the relevant time, lived in Jakarta and was involved in the oil industry. He no doubt visited his family in the UK and Ireland from time to time. However, no cogent or persuasive explanation was provided as to how and why he would have had contacts in the UK that would have led him to this opportunity out in Kent. The explanation that Mr Fitzpatrick was introduced to Mr Crocker through Chris Ashby strikes me as significantly more probable.

ii) If, as Mr Fitzpatrick says was the case, he declined the investment opportunity in the Company on behalf of himself and his own companies, but said that he would approach Mr Murray with a view to the latter investing instead, it is unclear why, on 20 July 1994, the then board of the Company should have considered a letter from Mr Coventry with regard to a proposed subscription of shares by VGC at a consideration of £300,000, and why it was that it was VGC that subsequently entered into the 1994 SSA on 19 December 1994. Mr Fitzpatrick said that he was presented with the 1994 SSA as a *"fait accompli"*, but Mr Fitzpatrick did not strike me as somebody who would have been pressured into signing a document that he did not want to sign.

iii) If the rationale for Mr Murray becoming involved was that Mr Fitzpatrick and VGC could not afford to make the investment, then it is odd that, apart possibly from VGC being reimbursed in respect of the initial £25,000, it was VGC that provided the consideration of £366,000 provided for by the 1994 SSA by, itself, paying cash to the Company, and by way of contribution by way of work done as evidenced by RE Jones & Co's letter dated 28 October 2005. Mr Fitzpatrick did say, in answer to my question, that the relevant monies were treated as having been lent by the Nisma Settlement to VGC and repaid. As to repayment, reliance was placed upon the £196,000 cheque paid to VGC in February 1997. However, this in itself raises a number of questions, including as to how the balance up to £366,000 was paid, and circumstances behind the £196,000 being raised through the bridging facility provided for by Bank of Ireland's facility letter dated 7 February 1997 addressed the Nisma Settlement but sent to Mr Fitzpatrick at VGC. The bridging loan terms provided for it to be repaid in full within two months, and there is no evidence as to how this was affected. Further, the offer letter referred, in opaque terms, to the purpose of the loan as being to *"provide a bed & breakfast facility for VAG Special Projects"*, whatever that might mean.

iv) There is the further oddity that the commission supposed to be payable to Mr Murray was not paid until 2003, by the payment of £350,000 on 3 February 2003 and monies owed by the company to VGC being treated as a loan to the Nisma Settlement, so as to arrive at the total of £454,217 recorded in Mr Murray's Declaration dated 16 May 2007. There is force in the point made on behalf of Mr Crocker that this all involved a money circle.

v) There is the further point regarding the inconsistent explanations provided by Mr Fitzpatrick as to when his wife and daughters were identified as beneficiaries, or potential beneficiaries of the Nisma Settlement. I have already described this inconsistency in some detail above, but the most contemporaneous document is the Letter of Wishes document dated 26 October

2010 signed by Mr Fitzpatrick referring to the Nisma Settlement as having been *"established for"* the benefit of his wife and her children and issue. Further, I regard it as significant that when Mr Fitzpatrick was asked about this by way of Request for Further Information, he identified 1995 as being when his wife and children were identified as beneficiaries or potential beneficiaries. Of course, Mr Fitzpatrick now says, consistent with that which was said to HMRC on his behalf in response to their inquiry, that his wife and children were only identified as beneficiaries in 2009, after the discussion with Mr Murray on 1 June 2009. However, a further difficulty with this is that members of the Fitzpatrick family were identified as beneficiaries at the meeting with Mr Bracher recorded in his email dated 24 March 2009 to Mr Fitzpatrick and Mr Crocker, sent prior to 1 June 2009.

264. Ultimately, I do not consider it necessary for present purposes to make any formal findings in relation to the efficacy of the Nisma Settlement and whether it did involve some form of tax dodge as alleged on behalf of Mr Crocker in that I do not consider that the present case turns thereupon. Further, I would, in any event, be extremely reluctant to do so given that the events in question took place so long ago, and HMRC investigated the matter in some detail some 20 years ago and decided to take no action. Further, there may well be further evidence going to the issues that arise which is not before the Court in the present proceedings, which such proceedings are not directly concerned therewith.

265. However, as I say, what I do get from the above is that there are, I consider, at least serious concerns as to the veracity of Mr Fitzpatrick's evidence in relation to Mr Murray's involvement in the Nisma Settlement, and the general efficacy of the Nisma Settlement and the purposes behind it. It is for these reasons that I consider that I must treat Mr Fitzpatrick's evidence with great caution, and not accept it unless corroborated in some way.

What was said by Mr Fitzpatrick to Mr Crocker about Mr Murray?

266. Based on the evidence that I have referred to, I am satisfied that Mr Murray did *"acquire"* the Nisma Settlement in the sense that I have referred to above in February 1995, and that he was thereafter, and until his death in August 2009, treated as the settlor thereof, albeit with Mr Fitzpatrick being authorised to act on his behalf as identified in the final paragraph of Mr Murray's letter dated 20 February 1995. Further, whatever the efficacy of the arrangements behind the Nisma Settlement, in order to avoid (if not evade) tax, it no doubt depended upon being based offshore with an offshore based settlor. In the circumstances, there can, as I see it, have been no real motive for Mr Fitzpatrick, as suggested, to dishonestly represent to Mr Crocker that he was the settlor of the Nisma Settlement if he was not. Indeed, he had every reason to make known, rather than cover up, Mr Murray's role as settlor of the Nisma Settlement if the tax planning arrangements depended upon Mr Murray being the settlor.

267. Further, so far as Mr Crocker was concerned, one would have thought that his concerns were more likely to be about the beneficiaries or intended beneficiaries of the Nisma Settlement, than the settlor. As to this, based upon what Mr Fitzpatrick said in the Letter of Wishes dated 26 October 2010 about the Nisma Settlement having been *"established for"* the benefit of his wife and children, and the other evidence that I have considered above, I consider it likely that Mr Murray made his wishes known very much earlier

than now contended by Mr Fitzpatrick, such that the Nisma Settlement could fairly be regarded as a settlement for the benefit of the Fitzpatrick family. Alternatively, if Mr Murray's role as *"effective settlor"* was purely nominal, then Mr Fitzpatrick was, in practice, in a position to direct the destination of the Nisma Settlement in any event.

268. I consider that it is having regard to these considerations that one must view any conversations between Mr Fitzpatrick and Mr Crocker with regard to who the *"effective"* settlor of the Nisma Settlement was, and who would ultimately benefited from the same.

269. Mr Crocker might now say that the service of the Particulars of Claim was when he first became aware that Mr Murray had been the settlor of the Nisma Settlement. However, he does not say, and nor can he, that this was the first time that he had heard of Mr Murray. As to Mr Crocker's knowledge of Mr Murray:

    i) Mr Crocker accepts that Mr Fitzpatrick discussed Mr Murray's involvement in the Nisma Settlement with him, albeit it is his recollection that he was informed or led to believe that Mr Murray was the *"administrator"* of the Nisma Settlement rather than it settlor;

    ii) Mr Crocker accepts that Mr Fitzpatrick mentioned Mr Murray to him on a number of occasions, albeit that Mr Crocker did not think that this was more than about five or so occasions;

    iii) Mr Crocker accepts that he met Mr Murray on one occasion. As I have already mentioned, I consider it improbable that Mr Murray simply brushed past Mr Crocker without there being any form of communication between them;

    iv) Something was clearly said about Mr Murray at the board meeting on 15 May 1997, hence Mr Preedy recording Mr Murray's name as against *"Nisma Settlement"* in making his note and doing so in circumstances in which the meeting had involved discussion regarding the fact that the shares in the name of VGC should in fact be in the name of the Nisma Settlement.

270. In these circumstances and given that Mr Crocker accepts that Mr Fitzpatrick did mention Mr Murray to him in the context of the Nisma Settlement, I consider it more likely than not that Mr Fitzpatrick described Mr Murray to Mr Crocker as being the settlor thereof rather than as being the administrator thereof. Indeed, I can see no logical reason why Mr Fitzpatrick would have described Mr Murray as the administrator. I consider it likely that Mr Crocker has simply misremembered this with the passage of time, rather than lying about it, as with his physical encounter with Mr Murray.

271. However, I do consider it important to consider how this failure of memory may have occurred. Mr Fitzpatrick is, and was at all relevant times, a forceful individual. Despite what HMRC might have been told, I consider that the likelihood is that Mr Fitzpatrick, from sometime prior to 2009, if not as far back as 1995, confidently proceeded on the basis that he would be able to procure a state of affairs whereby his wife and the Fitzpatrick Trustees would become beneficiaries of the Nisma Settlement. In these circumstances, I consider that he is likely, in many respects, to have treated the shares held by Camelot as being effectively under his control, and to have regarded the Nisma Settlement as akin to a settlement for his family and acted accordingly. Following Mr

Murray's death in August 2009, and in the lead up to the 2010 SHA, then this is even more likely, I consider, to have been the case.

272. I consider that it is in this context that what was said by Mr Fitzpatrick at the board meeting on 2 June 2020 has to be considered. As to that meeting, I have had the opportunity of both reading the transcript of the recording, and of listening to the recording itself on several occasions. I consider that what Mr Fitzpatrick said at 03:15 minutes into the meeting is explicable, as suggested by Mr Maynard-Connor KC, on the basis that what was said was in the context of the considerations behind the entry into of the 2010 SHA, and what might have been discussed at that point by which time Mr Murray had died, and Mr Fitzpatrick was, in the circumstances described above, unquestionably very much in control of events. In this respect, I consider that what was said by Mr Fitzpatrick at this stage of the meeting requires to be read together with what he said at 01:10 minutes into the meeting. What was said by Mr Fitzpatrick at 10:20 minutes into the meeting is potentially rather more problematic given that he refers to an understanding that he and Mr Crocker had *"right from the beginning"* that they would be passing on their respective interests to their daughters. However, again, I consider that this requires to be viewed in the context of Mr Fitzpatrick looking back over events over, even then, some 26 years and the considerations that I have identified in the previous paragraph, even if it was not a reference, which it may well have been, to the circumstances behind the entry into of the 2010 SHA when Camelot ceased to be a minority shareholder, and the venture became a 50-50 one as between Camelot/the Nisma Settlement and Mr Crocker.

273. In the circumstances, I do not regard it as surprising that Mr Crocker might, in seeking to recall events going back some 30 years, have been left with the impression that Mr Fitzpatrick had always held himself out as being the settlor of a trust or settlement for the benefit of his family members and represented that to have been the case. However, I do not consider that that is likely to have been the case. I consider that the position is likely to have been rather much more nuanced than that. As I have held, I consider that Mr Murray is likely to have been introduced to Mr Crocker, at an early stage, as the settlor of the Nisma Settlement. However, I consider that the circumstances referred to in paragraph 271 above likely explain why, over the years, Mr Crocker, if not also Mr Fortune may have spoken in terms of Mr Fitzpatrick being a shareholder, or, as recorded for example in Mr Crocker's email to Mr Crawley dated 17 March 2006, why Mr Crocker may have regarded him as the effective counterparty or potential counterparty to the joint venture conducted through the Company.

Discussions prior to the 2014 Transfer

274. I have already identified the difference in version of events as between Mr Fitzpatrick on the one hand, and Mr Crocker on the other hand regarding what was discussed between them prior to the 2014 Transfer. In short, Mr Crocker describes a short telephone call in which Mr Fitzpatrick simply told him either that the shares had been transferred, or that they would be transferred from the Nisma Settlement to the FFDS, or at least from his offshore trust to an onshore trust, simply by way of information, Mr Crocker's current position being that he is uncertain as to whether the call was made before or after the transfer of shares. On the other hand, Mr Fitzpatrick says that there were a series of discussions between September 2013 and November 2013 during the course of which he was keen to and did obtain Mr Crocker's consent and approval not only to the relevant transfer of shares to FFDS, and also to the latter stepping into

Camelot's shoes as counterparty to the 2010 SHA in circumstances in which it was made known that the transfers of the Ordinary and Preference shares would not proceed without Mr Crocker's consent and approval.

275. I have come to the firm view that I should accept Mr Fitzpatrick's evidence in preference to that of Mr Crocker in relation to the relevant conversations and find that conversations did take place between Mr Fitzpatrick and Mr Crocker broadly as described by Mr Fitzpatrick. I do so with not inconsiderable hesitation given my concerns as to the veracity of Mr Fitzpatrick's evidence concerning Mr Murray, the efficacy of the Nisma Settlement and Mr Keaney, and given that there is no particularly significant contemporaneous documentary evidence supporting Mr Fitzpatrick's version of events regarding the conversations. However, I do so for the following principal reasons:

i) I consider it important to bear in mind the relative importance of the conversations to Mr Fitzpatrick and Mr Crocker respectively. There is clear evidence that prior to the conclusion of the 2010 SHA, Mr Fitzpatrick, on behalf of Camelot, was anxious to ensure that if Camelot was to introduce additional funds and become a 50-50 shareholder in the Company together with Mr Crocker, then the relationship between the parties should be formally documented and regulated by a shareholders' agreement, not least because of Mr Crocker's status as freehold owner and lessor of the land used by the Company for the golf course. Although each side seemed to accept that both Mr Fitzpatrick and Mr Crocker were fully au fait with the pre-emption provisions in the 2010 SHA, and the exemption in respect of Ordinary shares held within a family trust, I am not convinced that this was necessarily the case. Nevertheless, that exemption would only have been capable of applying to the Ordinary shares, and not the Preference shares, and would not have enabled FFDS, without more, simply to step into the shoes of Camelot so far as the 2010 SHA is concerned. Having been concerned to ensure that Mr Crocker was tied down prior to the entry into of the 2010 SHA, I can well understand why Mr Fitzpatrick might have been very anxious to ensure that neither Camelot nor FFDS would be prejudiced by the transfer. To my mind, this makes it inherently unlikely that Mr Fitzpatrick would have proceeded without some form of comfort from Mr Crocker, and likely that he would have remembered seeking that comfort. On the other hand, the relevant conversations are likely to have been of much less significance to Mr Crocker who, on his own case, would simply have been agreeing to an onshore family trust stepping into the shoes of an offshore family trust. Particularly bearing in mind the characteristics of Mr Crocker that I have described, and the influences upon him referred to in paragraph 246 above, I consider that he is much less likely, 10 years after the event, to be able to reliably recall the relevant conversations, which such conversations will no doubt have been mixed in with other conversations regarding the affairs of the Company.

ii) As referred to, Mr Fortune recalls it being mentioned by Mr Fitzpatrick at a board meeting in or around 2014 that he was going to transfer the relevant shares from the Nisma Settlement to the FFDS. He suggests that this was just a question of Mr Fitzpatrick simply saying that this is what he was doing, but the significance of this is that it is inconsistent with Mr Crocker's evidence that the matter was only raised in a short telephone conversation (to which Mr Fortune

would not have been party) in respect of which he cannot recall whether Mr Fitzpatrick said that the shares had been transferred, or were going to be transferred. Again, given the relative unimportance of the matter to Mr Fortune, I consider that his recollection as to detail is likely to be unreliable. Of more importance, I consider, is that he recalls the matter being raised pre-transfer in the context of a board meeting. Mr Crocker accepted that the telephone conversation that he described could have been in 2013, and Mr Fortune talks in terms of a board meeting *"in or around"* 2014. This is consistent with the transfer having been discussed on 25 November 2013, as described by Mr Fitzpatrick under cross examination, most likely before or after the formal board meeting given the absence of evidence from either Mrs Powell or Mrs Boyes with regard to discussion at a formal board meeting that they would have attended.

iii) Mr Fitzpatrick's evidence ties in with the correspondence between Mr Bateson and Mr Coventry in August 2013, and Mr Coventry reverting back to Mr Bateson on 26 November 2013 in order to inform him that the FFDS was in a position to proceed. Of course, it is possible that Mr Fitzpatrick has made up his story to fit with this correspondence and I take into account that Mr Fitzpatrick in giving evidence as referred to in paragraph 104 above placed particular reliance on a particular conversation on 25 November 2013, rather than the series of conversations referred to in his witness statement. However, no other explanation has been provided for this gap in events.

iv) Further, there is the evidence of Mrs Powell being told by her father that he had discussed the transfer and the 2010 SHA with Mr Crocker in the context of the proposed transfer of shares. As I have already said, I regard her evidence as to this as both true and reliable, and evidence to which I should give considerable weight. Further, I consider it most unlikely that Mr Fitzpatrick would have told her that he had had these conversations if he had not. There is the point that a commercial solicitor might have been expected to advise that what had been agreed between Mr Fitzpatrick and Mr Crocker should be well documented, indeed, it might be said that Mr Fitzpatrick, having required the formality of the 2010 SHA, would also have wanted that which he had agreed with Mr Crocker to be well documented. I take these points on board, but it should be recalled that, from Mrs Powell's perspective, she was aware that Mr Fitzpatrick had his own professional advisers, including, in particular, Mr Coventry. So far as Mr Fitzpatrick is concerned, despite his insistence of the formality of the 2010 SHA at the time thereof, the evidence suggested that he was somebody who generally took people at their word, and he and Mr Crocker had been in business together for some 20 years, during the course of which they would have regular meetings at which they discussed what needed to be discussed. Consequently, these latter considerations do not lead me to any different conclusion.

v) I consider that I am entitled to take into account my findings as to the general unreliability of Mr Crocker's evidence. On this issue, there is really no corroborative evidence to support Mr Crocker's version of events, in contrast to the evidence of Mr Fitzpatrick which is supported by that of Mrs Powell, Mr Fortune and the considerations as to the inherent probabilities of the situation that I have discussed, albeit by no contemporaneous documentary evidence,

save perhaps for Mr Coventry's email of 26 November 2013 to which some limited weight can, I consider, be attached.

vi) In addition, I consider it relevant that Mr Crocker has been inconsistent in his evidence in relation to what may or may not have been discussed between himself and Mr Fitzpatrick in relation to the transfer of shares. As already identified, the first version of events was as described in Warners' letter dated 21 June 2019, namely that the relevant transfer took place without any notice to Mr Crocker, who only became aware of it after the event. There was then the version of events given at the board meeting on 2 June 2020 when Mr Crocker described a very brief conversation in which Mr Fitzpatrick said that he *intended* moving his shares onshore to a family trust. His most recent iteration, which he stuck to at trial, was that he could not recall whether the brief conversation took place before or after the transfer. In contrast, the Fitzpatrick Parties have maintained a consistent position, as reflected firstly in JMW's response dated 6 August 2019 to Warners' letter, in which reference is made to there being numerous conversations with regard to the matter, and to Mr Fitzpatrick checking that Mr Crocker was agreeable to what was proposed, which he confirmed that he was. As to the reliability of Mr Crocker on this point, I regard it is not without significance that when Mr Crocker said what he did at the meeting on 2 June 2020, Mrs Boyes sought to move the narrative back to the original story during the course of her intervention at 12:07 minutes into the meeting when she said: *"The point is that we weren't told before you did it."* When cross examined on this Mrs Boyes said that she so intervened because that is what she understood position was on the issue. This suggests that there had been discussion within the family on the point, and this does heighten my concern that Mr Crocker's recollection may well have been falsely triggered by conversations within the family that took place in an attempt to fill memory gaps.

vii) Finally, there is the point that Mr Crocker signed the share certificates in relation to the relevant shares, having been shown the relevant stock transfer forms, without apparently questioning the position in any way.

276. In the circumstances, I consider that I must proceed on the basis that, prior to the 2014 Transfer, discussions did take place between Mr Fitzpatrick and Mr Crocker broadly in line with Mr Fitzpatrick's evidence in relation thereto, and such is my finding on this issue.

Did Mr Fitzpatrick fraudulently misrepresent the position?

277. As I have identified, the gist of the case in deceit that is levelled against Mr Fitzpatrick is that the 2014 Transfer, or at least any consent or approval to it by Mr Crocker, was procured by fraudulent misrepresentations made by Mr Fitzpatrick to Mr Crocker that the Nisma Settlement was his family trust and that it involved a simple transfer from his offshore trust (the Nisma Settlement) to his onshore English trust (the FFDS), i.e. that he, Mr Fitzpatrick, was the settlor of both trusts, with the consequence of there being a permitted transfer under Article 5.3 of the 2010 Articles.

278. As Mr Zaman KC and Mr Heylin, on behalf of Mr Crocker, identified in their closing submissions by paraphrasing what was said by Jackson LJ in *Ludsin Overseas Limited*

v Eco3 Capital Limited [2012] EWCA Civ 413, at [77]-[82], a claim in deceit/fraudulent misrepresentation requires proof of the following:

i) There must be a representation of fact made by words or by conduct and mere silence is not enough.

ii) The representation must be made with knowledge that it is false, i.e., it must be wilfully false or at least made in the absence of any genuine belief that it is true or recklessly, i.e., without caring whether the representation is true or false.

iii) The representation must be made with the intention that it should be acted upon by the claimant, or by a class of persons which will include the claimant, in the manner which resulted in damage to him.

iv) The claimant acted upon the false statements; and

v) The claimant has sustained damage by so doing.

279. I have already made a number of findings of fact that bear upon this issue, but, in short, I am simply not persuaded that Mr Fitzpatrick did make any representations with regard to being the settlor of the Nisma Settlement, to the effect that the latter was his family settlement, or that the relevant transfers were simply from one family trust to another (and therefore were permitted transfers under Article 5.3), knowing the same to be false, or not caring whether the same were true or false, whether with the intention that they should be acted upon by Mr Crocker or otherwise.

280. It is a feature of Mr Crocker's case in deceit that the deceit on the part of Mr Fitzpatrick went right back to the early days of the Company, when, so it is alleged, Mr Fitzpatrick first represented that he was settlor, or at least that the Nisma Settlement was his family trust. However, I have already found that, in the early days, Mr Fitzpatrick did inform Mr Crocker that Mr Murray was, or had become (in the sense of being treated as) settlor of the Nisma Settlement, and that the point was reached at some point, certainly after Mr Murray's death and probably prior thereto, when the expectation was or became that Mr Fitzpatrick's wife and daughters would be treated as the beneficiaries of the Nisma Settlement. Further, even prior to Mr Murray's death, I have little doubt that Mr Fitzpatrick had considerable sway over the way that the Nisma Settlement was operated, and that following Mr Murray's death, he was the effective controller thereof to whom Camelot, as trustee of the Nisma Settlement would look for direction. I consider that it is in this context that Mr Fitzpatrick will have acted on the basis that, and may have led others such as Mr Crocker to believe that the Nisma Settlement was a Fitzpatrick family trust, on the basis that he truly believed that to be the position.

281. Necessarily one is, for present purposes, concerned with whether there was any operative misrepresentation at the time that it is alleged that Mr Crocker acted upon the same by waving through the 2014 Transfer to the FFDS. In the circumstances that I have described, I find it difficult to see that there was any false operative representation, let alone one made by Mr Fitzpatrick which he knew to be false, or in respect of which he did not care whether it was true or false (i.e. in respect of which he acted recklessly).

282. Further, I am not persuaded that anything really turns upon whether anything that Mr Fitzpatrick may have said might have led Mr Crocker to believe that the 2014 Transfer

was a permitted transfer. Firstly, contrary to what Mr Crocker might now say or indeed believe, I am not convinced that Mr Crocker would, at the time, rather than now, have appreciated the subtleties of Article 5.3 of the 2010 Articles. However, more significantly, Article 5.3 could only potentially have provided an answer so far as any transfer of the Ordinary shares was concerned. Any transfer of the Preference shares, and any question of the FFDS stepping into the shoes of Camelot so far as the terms of the 2010 SHA is concerned, depended upon Mr Crocker's consent in any event, and whether or not one was concerned with the transfer from one family trust to another with the same settlor made no difference in respect thereof because the concept of permitted transfers only applied to the Ordinary shares.

283. Further, in the circumstances that I have described, I do not consider that the case has been made out that Mr Fitzpatrick, or rather Camelot acting through Mr Fitzpatrick, acted in breach of the obligations of good faith under the 2010 SHA in relation to the way in which the proposed transfer of shares from the Nisma Settlement to the FFDS was presented to Mr Crocker, or indeed that Mr Fitzpatrick acted in breach of his fiduciary duties owed to the Company in this respect.

284. In addition, and on a somewhat different point, I do not consider that these obligations of good faith, or Mr Fitzpatrick's fiduciary duties owed to the Company were breached by the way that the 2014 Transfer was structured, namely as a sale at a price of £25,000 after some attempt had been made to portray the sale as an open market sale, but where the FFDS was always going to be the purchaser. As I have said, it is unclear on the evidence as to why Mr Coventry and Mr Bates, between themselves, structured matters as a sale of the relevant shares rather than some form of disposition without consideration. This may have been for taxation or trust administration reasons. However, the reality of the position was that the shares were being transferred from one trust (outside the jurisdiction) under which Mr Fitzpatrick's relatives stood to benefit prior to the 2014 Transfer, to another trust (within the jurisdiction), where Mr Fitzpatrick's relatives again stood to benefit. Once this is understood, and apart from the relevant pre-emption provisions of the 2010 Articles, it is difficult to see that any breach of the relevant obligations of good faith under the 2010 SHA, or of Mr Fitzpatrick's fiduciary duties owed to the Company, occurred simply because the relevant shares were not offered to Mr Crocker.

Assignment of the £364,641 debt owed by the Company to Camelot

285. A somewhat similar complaint arises in respect of the assignment dated 2 November 2016 of the debt of £364,641 owed by the Company to Camelot as trustee of the Nisma Settlement to Mr Fitzpatrick for a consideration of £3,647. It is suggested that some obligation or duty was owed to offer the debt for sale more widely, and in particular to Mr Crocker. There is the oddity of this assignment being described as one to the FFDS in correspondence between Mr Fitzpatrick and Mr Coventry, and in correspondence with RBS in April 2017. However, as Mrs Powell said in the course of her evidence, this was never a debt that was on the market for sale and was only ever going to be assigned to the FFDS or Mr Fitzpatrick. It is reasonably clear that the assignment of the debt had something further to do with the winding down of the affairs of the Nisma Settlement, and the dissolution of Camelot. As with the transfer of the shares to the FFDS, the transaction has been structured as a sale, for reasons that have not been explained, but I do not consider that anything turns on this.

286. In the circumstances, I find it difficult to see that either Mr Crocker or the Company could have any real cause for complaint that the relevant debt had been assigned in the circumstances in which it was. In any event, I find it difficult to see that this has any real bearing on the issues that require to be decided in the present case.

DETERMINATION OF THE CLAIM, COUNTERCLAIM AND PART 20 CLAIM

Introduction

287. I have already answered the first of the overarching questions identified on behalf of Mr Crocker and referred to in paragraph 3 above in finding that there was no fraud upon Mr Crocker by Mr Fitzpatrick depriving him of his pre-emption rights under the 2010 Articles by inducing him to act in the way that he did by the making of representations that he knew to be false, or in respect of which he did not care whether they were true or false. However, I understand that it is still contended on behalf of Mr Crocker that the 2014 Transfer, and therefore the current registration of Mrs Powell as holder of the relevant shares is open to challenge because the 2014 Transfer was effected contrary to the terms of the 2010 Articles.

288. Further, the second of the overarching questions remains live, namely whether the 2010 SHA was and is binding as between the Fitzpatrick Trustees and Mr Crocker even though:

    i) Clause 13(1)(a) of the 2010 SHA provides for termination of the 2010 SHA when one party ceases to hold any shares, e.g. on a transfer of their shares to a third party; and

    ii) The Fitzpatrick Trustees were not parties to the 2010 SHA.

289. I will deal with each of these issues in turn.

Are the 2014 Transfer and the registration of shares open to challenge?

290. The fact of the matter is that Mrs Powell is now registered as a member in the Company's register of members in her capacity as a trustee of the FFDS, and on behalf of the latter. The issue must therefore be as to whether, even if there was no fraudulent misrepresentation on the part of Mr Fitzpatrick, that registration is open to challenge in some way because the 2014 Transfer was, and is open to challenge, and liable to be treated as ineffective.

291. I understand Mr Crocker's argument to be that there was concluded in August 2013, in the correspondence between Mr Bateson and Mr Coventry, an agreement for the transfer of the relevant shares to the FFDS which triggered a requirement to serve a Transfer Notice pursuant to Article 6.1 of the 2010 Articles in respect of the Ordinary shares held by Camelot, which was not done with the 2014 Transfer proceeding notwithstanding. Further, so far as the Preference shares are concerned, it is said that the 2014 Transfer took place without obtaining the *"written consent"* of Mr Crocker as the other *"Preference Shareholder"*. Consequently, it is Mr Crocker's case that as the 2014 Transfer took place *"otherwise than in accordance with the provisions of these Articles"*, the 2014 Transfer *"shall be void and had no effect"* as provided for by Article 6.9.

292. Although I do not consider that this question turns upon this particular issue, I am not convinced that an obligation to serve a Transfer Notice did arise in consequence of the correspondence in August 2013. It is true that Mrs Powell did accept during the course of her cross examination that there was included within that correspondence an offer and acceptance sufficient to give rise to a contract, but I am not satisfied that this was the case. It is, of course, Mr Fitzpatrick's position that he considered that he would need to obtain Mr Crocker's approval to the FFDS stepping into the shoes of the Nisma Settlement, hence the gap in time until 26 November 2013. I consider that the expression *"agreeing to transfer"* in Article 6.1 must mean entering into a binding agreement to transfer. In the circumstances, I am not persuaded that a binding agreement to transfer was concluded by the correspondence in August 2013, or otherwise prior to a stock transfer transferring the Ordinary shares being signed, initially on 3 December 2013. Given that it was appreciated that Mr Crocker's approval was required, I consider the better view to be that until such approval was obtained, any agreement between Camelot and the Fitzpatrick Trustees was implicitly conditional upon such approval being obtained or, alternatively, that until such approval had been obtained there was no intention to create legal relations. However, Mr Crocker does still have the point that the stock transfer was executed on 3 December 2013 transferring the Ordinary shares held by Camelot to the FFDS, without any Transfer Notice having been given to Mr Crocker.

293. The difficulty from Mr Crocker's point of view is, as I see it, that my finding of fact is that he did agree and consent to the relevant transfer of shares in the course of the conversations between himself and Mr Fitzpatrick leading up to 26 November 2013, and that although any agreement or consent arising therefrom was only oral, Mr Crocker must, as I see it, be taken to have confirmed that consent in writing by signing the share certificates relating to both the Ordinary shares and the Preference shares, and then acquiescing at least in the process whereby FFDS was registered a shareholder, with the registration subsequently being corrected to show Mrs Powell as shareholder.

294. This would, as I see it, be sufficient to provide, albeit retrospectively, the *"written consent"* required for the purposes of Article 6.10 of the 2010 Articles in respect of the Preference shares held by Camelot. Further, applying the principles of promissory estoppel and waiver that I deal with in more detail below in relation to the issues relating to the 2010 SHA, I consider that, in the circumstances, Mr Crocker must, in any event, be taken to be estopped by operation of a promissory estoppel from taking any point in relation to Articles 6.1, 6.9 and 6.10 of the 2010 Articles, and/or to be taken to have waived any right to do so.

295. As dealt with in more detail below, it is a feature of promissory estoppel that the party alleged be subject thereto does not need to understand the legal rights of either party, so long as, in the circumstances, it would be unconscionable for that party to go back upon what had been represented as being the position. Given not least Mr Crocker's ultimate acceptance of the importance, at least to Mr Fitzpatrick, of the 2010 SHA, if, as I have held, Mr Crocker did provide Mr Fitzpatrick with the comfort that he sought with regard to the transfer of shares to the FFDS in circumstances where the transaction would not have proceeded had that comfort not been provided, I am of the firm view that it would be unconscionable for Mr Crocker to now insist on his legal rights so far as, in particular, the provisions of Article 6.9 are concerned.

296. There are, as I see it, further potential issues in relation to estoppel and waiver given the way that the Company was operated from and after the 2014 Transfer, and until the relationship between the Fitzpatrick Parties and Mr Crocker and his family broke down. However, bearing in mind that the Fitzpatrick Parties' case is not put in terms of estoppel by convention, and given the basis upon which I have been able to find in favour of the Fitzpatrick trustees without a consideration of this issue, I do not deal with such issues any further.

297. In conclusion, therefore, on the question of the validity and effect of the 2014 Transfer, absent a finding of fraudulent misrepresentation on the part of Mr Fitzpatrick, I do not consider that there can be any proper basis for now treating the same as void and/or of no effect so as to warrant rectifying the register of members of the Company to remove Mrs Powell as shareholder in respect of the relevant Ordinary and Preference shares in the Company.

Are the terms of the 2010 SHA still binding?

Introduction

298. On the face of things, the Fitzpatrick Trustees, even if they are, as I have found, properly to be treated as holders of the relevant Ordinary and Preference shares in the Company, are in no position to seek to rely upon the 2010 SHA on the basis that they were not parties to it, and because, in any event, it terminated pursuant to clause 13.1(a) of the 2010 SHA upon the transfer by Camelot (who was a party thereto) of all its shares to the FFDS.

299. The Fitzpatrick Parties are constrained to accept that the 2014 Deed of Assignment does not provide an answer because it could not deal with the burden of the 2010 SHA. The issue is as to whether the Fitzpatrick Parties can establish that Mr Crocker is now estopped from relying upon clause 13.1(a) of the 2010 SHA, and also estopped from treating the Fitzpatrick Trustees as the counterparty to the 2010 SHA, and/or whether or not the 2010 SHA has been novated such that the terms thereof are now binding as between Mr Crocker on the one hand, and the Fitzpatrick Trustees on the other hand. I note that the estoppel that the Fitzpatrick Parties seek to rely upon is a promissory estoppel. No case was advanced that there was or is in existence an estoppel by convention although conceivably it might have been.

Promissory Estoppel

300. As I have said, the Fitzpatrick Parties rely upon the summary of the relevant principles in Spencer Bower, Reliance-Based, 5th Ed, at para 1.18 where it is said that the following elements must be established in order to constitute a valid estoppel by representation of fact[2]:

    i) The alleged representation of the party that is sought to be estopped was a representation of fact;

    ii) The precise representation relied upon was in fact made;

[2] Para 1.18 refers to this analysis in the 4th Ed of Spencer Bower as having been adopted (*obiter*) by Carr J (as she then was) in *Spliethoff's Bevrachtingskantoor BV v Bank of China* [2015] CLC 651 at [156].

iii) The case which the party is to be estopped from making contradicts in substance his original representation;

iv) The representation was made with the intention (actual or as reasonably understood) and the actual result of inducing the party asserting the estoppel to alter his position on the faith thereof to his detriment; and

v) The representation was made by the party to be estopped, or by some person for whose representations he is deemed in law responsible, and was made to the party asserting the estoppel, or to some person in right of whom he claims.

301. It is to be noted that it is not necessary to show that the party to be estopped understood the legal rights of either party – see *Peyman v Lanjani* [1985] Ch 457 at 495B, per May LJ. However, as Spencer-Bower (supra) identifies at para 14.20, knowledge of legal rights might well be relevant to whether there has been a sufficiently unambiguous representation.

302. A key aspect of promissory estoppel is that the representation or assurance in question must be shown to be intended to create legal relations in circumstances in which, to the knowledge of the person making the same, it was going to be acted upon by the person to who it was made - *Central London Property Trust Ltd v High Trees Ltd* [1947] KB 130, per Denning J at 134. An aspect of this, as reflected in the element referred to in paragraph 300(iv) above, is that the representation or assurance in question must be intended by the person making it to be acted upon and binding, or at least the person making the representation or assurance must be reasonably understood to have that intention – see Spencer Bower (supra) at 14.21.

303. Further, there is a line of authority, connected to the requirement that the promise or assurance should be intended to be legally binding, to the effect that there should be an existing legal relationship between the parties within the framework of which the estoppel might operate – see e.g. *Thorner v Major* [2009] 1 WLR 776 at [61], per Lord Walker (*obiter*). However, there is other authority to the effect that a contractual relationship may not be essential provided that there is some pre-existing legal relationship which could give rise to liabilities and penalties – see e.g. *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839.

304. The effect of the related doctrine of waiver was considered by Aikens LJ in *Persimmon Homes (South Coast) Ltd v Hall Aggregates* [2009] EWCA Civ 1108 at [52]-[53], where he said:

> *"[52] A party to a contract (A) may waive the obligation of the other party to the contract (B) to perform a stipulation in the contract that is for the benefit of A. A may waive the obligation without any request by B that A do so. But A will only be taken to have waived the obligation of B to perform that stipulation of the contract if, (in the absence of a request to do so by B), A has made an unequivocal representation to B that A does waive the performance of the stipulation. That unequivocal representation can be by words or conduct, but does not have to be as blunt as "I hereby waive" the other party's obligation to perform the stipulation. For the waiver to be effective, B*

must either act on the unequivocal representation of A to his detriment; or he must conduct his affairs on the basis of the waiver.

[53] The doctrine of waiver, as summarised above, is similar to that of equitable estoppel, although in the case of the latter the effect of the equitable estoppel may only be temporary..."

305. On the basis of my findings of fact, I am satisfied that most, if not all of the elements of a promissory estoppel have been made out.

306. Mr Fitzpatrick, acting for this purpose on behalf of the FFDS, sought, and obtained, from Mr Crocker an assurance that if there were to be a transfer of shares from Camelot to the FFDS, Mr Crocker was agreeable thereto, and also that Mr Crocker agreed to the FFDS stepping into Camelot's shoes so far as the 2010 SHA was concerned. The matters discussed and agreed upon were reasonably unambiguous, and given the nature of the conversation and that Mr Fitzpatrick was looking for assurances, Mr Crocker must have known that the FFDS would act thereupon, and that it would suffer detriment if Mr Crocker stuck to his legal rights to the extent that they were inconsistent with what had been agreed.

307. Mr Fitzpatrick may well, given his nature and the power dynamic between himself and Mr Crocker, have discussed such matters in terms of what he was proposing to do with the shares the subject matter of the 2014 Transfer, and that is how it may have come across to Mr Crocker. However, by raising the matter with Mr Crocker before the transaction took place rather than simply presenting the 2014 Transfer as a fait accompli, I consider that Mr Crocker must have appreciated that Mr Fitzpatrick was looking to him for his agreement and approval given his acceptance of his knowledge of the importance that Mr Fitzpatrick attached to the 2010 Agreement, and given the reliance that he was aware that Mr Fitzpatrick, and thus the FFDS, was placing thereupon, that he intended to be bound thereby, or at least is to be taken as having so intended given that he was aware that Camelot and The Fitzpatrick Trustees were changing their position by entering into the 2014 Transfer.

308. Certainly, given that the 2014 Transfer proceeded on the basis that Mr Crocker was agreeable to the same, and to the FFDS stepping into the shoes of Camelot so far as the 2010 Agreement was concerned, I am satisfied that it would, in principle, be unconscionable for Mr Crocker to go back on that which he had assured Mr Fitzpatrick that he was prepared to accept.

309. My reservation so far as any promissory estoppel is concerned is that there was, as I see it, no existing legal relationship between Mr Crocker on the one hand and the FFDS on the other, and thus so far as the relief now sought by the Fitzpatrick Trustees on behalf of the FFDS is concerned, one is concerned with something other than the way in which Mr Crocker might be entitled to enforce his rights, said to be restricted by the estoppel, vis-à-vis the existing counterparty, here Camelot, to the 2010 SHA and the 2010 Articles. Further, it might be said that, in the present instance, the Fitzpatrick Trustees are seeking to do something that cannot be done with a promissory estoppel, that is using the same as a sword rather than as a shield so as to establish some new right of their own as against Mr Crocker. In these circumstances, I am not persuaded that Fitzpatrick Trustees' case can properly be founded upon, or assisted by any promissory estoppel or waiver, at least unless there has been a novation as alleged. As must be

apparent from the passage from *Persimmon Homes* (supra) at [52]-[53] that I have cited above, the need for an existing legal relationship is even more apparent in the case of the doctrine of waiver.

310. I thus turn to consider novation.

Novation

311. A helpful summary of the principles behind novation is provided in the judgment of Falk LJ in *Musst Holdings v Astra Asset Management* (supra) at [55]-[59]. As set out therein:

i) As explained in Chitty on Contacts, 35th Ed at para 23-089 et seq, a novation takes place where a new contract is substituted for an existing contract. This typically occurs where an existing contract between A and B is replaced by a contract between A and C, with C assuming B's rights and obligations under a new contract with the old contract being discharged. Consideration for both the discharge agreement and the new contact is required, and generally provided by A providing consideration for C's promise by agreeing to release B, and B providing consideration for being released by providing A with the obligations of the new counterparty, C.

ii) On this basis, a novation differs from an assignment in a number of respects, including the requirement for consent by all parties (A, C and C), the feature that rights and obligations are extinguished and replaced, and the fact that not only rights but also obligations are taken over by the new party.

iii) Whilst the consent of all parties is required for a novation, consent can either be provided expressly or can be inferred from conduct. Whether consent has been provided is a question of fact.

iv) However, a novation will only be inferred from conduct if that inference is required to give business efficacy to what has happened. Falk LJ cited the following explanation of Lightman J in *Evans v SMG Television Ltd* [2003] EWHC 1423 (Ch) at [181]:

> *"The proper approach to deciding whether a novation should be inferred is to decide whether that inference is necessary to give business efficacy to what actually happened (compare Miles v Clarke [1953] 1 WLR 537 at 540). The inference is necessary for this purpose if the implication is required to provide a lawful explanation or basis for the parties' conduct."*

v) The Court of Appeal in *MSC Mediterranean Shipping Co SA v Polish Ocean Lines (The "Tychy" (No. 2))* [2001] 2 Lloyd's Rep 403 at [22] emphasised that in applying the civil standard of proof to the question as to whether there had been a novation: *"clear evidence of an intention to produce a novation is likely to be needed if that standard of proof is to be discharged.*

312. I would make the following further observations derived from the authorities identified by Mr Maynard-Connor KC and Ms Boothman referred to in paragraph 191 above:

i) The authorities emphasise that in considering whether novation is to be inferred from the continuing party's conduct, that conduct is to be judged objectively;

ii) The continuing party may validly consent to a novation in advance; and

iii) Evidence of subsequent actions is admissible to establish whether there has been a novation by conduct.

313. On the basis of my findings of fact, but subject to a consideration of effect of clauses 18.1, 19.1 and 19.2 of the 2010 SHA, I am satisfied that there has been a novation in the present case, and that Mr Crocker and the Fitzpatrick Trustees are bound by a new contract in the terms of the 2010 SHA.

314. I reach this conclusion essentially for the following reasons:

i) On the basis of my findings of fact, it was expressly discussed and agreed between Mr Fitzpatrick and Mr Crocker that if the relevant shares were transferred by Camelot/Nisma Settlement to FFDS, then FFDS would step into Camelot's shoes so far as the 2010 SHA was concerned. In such circumstances, where the 2010 SHA did not require to be in writing, and Mr Crocker was aware that Mr Fitzpatrick required comfort both in respect of the shares and the 2010 SHA, and was prepared to give it, as I found that he did, then as that could only realistically be achieved by way of a new contractual arrangement as between Mr Crocker and the Fitzpatrick Trustees, I consider that a novation must have been the effect of what was agreed even though Mr Fitzpatrick and Mr Crocker might not have analysed matters in those terms at the time, and the Fitzpatrick Parties might not have come to analyse it in those terms, until they applied to amend shortly prior to trial. As we are concerned with an objective exercise, the label that the parties attached to the relevant transaction is irrelevant. Consequently, even though, as between themselves, Camelot and the FFDS may have purported to place the FFDS in the shoes of Camelot by the 2014 Deed of Assignment, as Mr Crocker's agreement to what was being sought to be done had been obtained, what was done, looking at the circumstances in the round, ought, in my judgment, to be properly analysed as a novation on the basis, not least, that such is necessary to give business efficacy to what occurred,

ii) Even if it were not, from the circumstances, possible properly to conclude that Mr Crocker expressly agreed to the FFDS/the Fitzpatrick Trustees stepping into Camelot's shoes so far as the 2010 SHA is concerned, in circumstances in which Mr Fitzpatrick, at least, attached great importance to the 2010 SHA and even Mr Crocker accepted (as he did on 2 June 2020) that the 2010 SHA was the *"guiding light"* for the two 50-50 shareholders in the joint venture conducted through the Company, then if, as I consider that there was, express agreement between Mr Fitzpatrick (acting on behalf of Camelot and the Fitzpatrick Trustees) and Mr Crocker that the relevant Ordinary and Preference shares might be transferred to FFDS/the Fitzpatrick Trustees, then I consider that a novation ought, in those circumstances, still to be inferred. I consider this to be the case for the following reasons:

a) I consider that the inference of their being a novation was necessary to provide business efficacy to what actually happened. In the circumstances of an existing 50-50 joint venture relationship between Camelot/the Nisma settlement and Mr Crocker founded upon the 2010 SHA and the 2010 Articles, there was, as I have found, agreement on the part of Mr Crocker to Camelot transferring its shares to the FFDS/the Fitzpatrick Trustees, and the FFDS was provided with a signed share certificate, and registered as a member and in practice stepped into the shoes of Camelot, even if nothing was expressly said about the 2010 SHA.

b) This state of affairs is recognised by the parties' subsequent conduct. Nothing may have been expressly said for a number of years with regard to the 2010 SHA, but then there was nothing to suggest that it had been abandoned, and nor was attempt made to treated as having been abandoned until it became tactically advantageous for Mr Crocker, acting on Mr Boyes' advice, to suggest that the 2010 SHA had not survived the 2014 Transfer. To the contrary, until such tactical position was taken, and in the early days of the dispute between the parties, it was to the 2010 SHA that the parties first turned in order to ascertain their rights as illustrated by, for example, the correspondence in respect of Adventure Golf, and in respect of *"Non-Golf Turnover Rent"* as referred to in clause 7.6 of the 2010 SHA.

315. However, it is necessary to consider the potential effect of clauses 18.1, 19.1 and 19.2 of the 2010 SHA, namely the no assignment without written consent, no formal variation, and no oral waiver provisions that I have referred to above, and to consider whether these prevent the Court from concluding that there has been a novation.

316. In *Musst Holdings* (supra) at [82], Falk LJ accepted that a no oral variation provision in similar terms to clause 19.1 could not apply to a novation because whilst a varied contract remains in place, a novation is the replacement of a contract by a new contract between different parties and thus not encompassed by a no oral variation provision. However, Falk LJ went on, at [83], to consider a non-assignment without written consent provision in similar terms to clause 18.1 of the 2010 SHA as being of potentially greater relevance. As to this she went on to say: *"Arguably what occurred in this case could be construed as some form of attempted dealing by Octave [one of the original contracting parties] when it agreed with Astra LLP [a third party] that the latter should take over Octave's investment management role and thereafter dropped out of the picture."* In the event, in that case, the point fell away because the other contracting party had (in writing) waived the requirement for prior consent and instead provided consent after the relevant dealing occurred. However, this analysis does raise the possibility that clause 18.1 may be of significance in the present case, particularly if there has been no written waiver as there was in *Musst Holdings*.

317. However, I am not persuaded that clause 18.1 of the 2010 SHA, as a matter of true construction thereof, does apply to a novation, at least as effected in the circumstances of the present case. I note that in contrast to the present case, the novation in question in *Musst Holdings* was not of the whole contract, but only of certain obligations under it.

318. The effect of a provision such as clause 18.1 is that if the prior written consent is not obtained, the relevant dealing will be ineffective against the other party. However, as Falk LJ observed in *Musst Holdings* at [86] by reference to what had been said by Millett LJ in *Hendry v Chartsearch* [1998] CLC 1382 at 1394, *"a breach of a provision requiring prior consent to a transfer is capable of waiver by the other contracting party, in the form of retrospective consent, albeit that that consent would not be the prior consent contemplated by the clause."*

319. In the present case, at least, the novation comprised a tripartite agreement between Camelot (acting by Mr Fitzpatrick), the Fitzpatrick Trustees (acting by Mr Fitzpatrick) and Mr Crocker, the effect of which was that the 2010 SHA was terminated by agreement, and a new contract came into existence on the terms of the 2010 SHA between the Fitzpatrick Trustees and Mr Crocker, as I see it simultaneously with the 2014 Transfer.

320. The question is whether what occurred can properly be described as involving Camelot assigning, granting any encumbrance over or sub-contracting or dealing in any way with *"any of its rights under this agreement"*. Whilst the 2014 Deed of Assignment may have been expressed in terms of assignment, if, as I consider to be the case, the transaction is properly analysed as Camelot agreeing with the FFDS and Mr Crocker to the termination of the 2010 SHA, so that a new contract on the same terms came into existence as between the FFDS and Mr Crocker, then I do not consider that the wording of clause 18.1 is, as a matter of true construction thereof, apt to cover what occurred.

321. Applying the reasonable objective observer with knowledge of the background facts test at the relevant time approach to contractual interpretation, I do not consider that the reasonable objective observer would consider a tripartite agreement of this kind involving, effectively, the extinction of rights under the 2010 SHA and the entry into of a new agreement (with new rights), as being encompassed by the dealings envisaged by clause 18.1. I consider that the ejusdem generis principle applies, which is that if it is found that things described by particular words have some common characteristic which constitutes them a genus, the general words which follow them ought to be limited to things of that genus – see Lewison, The Interpretation of Contracts, 8th Ed., Chapter 7, Section 10. Clause 18.1 includes the general words *"or deal in any way with, any of its rights"*, but these general words follow a reference to assigning, granting any encumbrance, or sub-contracting, which, as I see it, point to some bilateral disposition concerning the rights under the 2010 SHA involving a party to the 2010 SHA and a third-party, rather than some agreement that involves a consensual arrangement, such as a novation, including both parties to the 2010 SHA and involving a termination of the rights under the 2010 SHA, rather than a disposition thereof involving a third party.

322. Consequently, I do not consider that the effect of clause 18.1 is to prevent any novation from being effective because the prior written consent of Mr Crocker was not obtained. However, I do consider that a provision such as clause 18.1 may be of relevance in circumstances such as the present in a different respect. I consider that a provision such as this, when read together with provisions such as clauses 19.1 and 19.2, is a factor that the Court is required to weigh in the balance in considering whether, looking at the matter objectively, there has been a novation which, of course, is dependent upon the express or inferred consent of the continuing party. When the original contract contains provisions such as this, then I consider that the Court is required to be more cautious before concluding that the evidence is sufficiently strong to conclude, considering the

matter objectively, that there has been a novation. I have taken these factors into account, but in the circumstances of the present case I do not consider that they lead to a different conclusion than that, looking at the matter objectively, a novation was agreed upon in the circumstances of the present case.

323. Should I be wrong on the question of the true interpretation of clause 18.1 of the SHA, then I would have concluded that Mr Crocker is estopped from relying thereupon, or has waived his right to do so applying the authorities referred to in paragraph 300 et seq above. An objection to waiver or the existence of a promissory estoppel in considering more generally whether Mr Crocker was estopped from treating the Fitzpatrick Trustees as being counterparty to a contract on the same terms as the 2010 SHA was the absence of an existing legal relationship. However, this is a different context, involving a consideration of estoppel or waiver in the context of a tripartite agreement involving not only the original contracting parties, but the Fitzpatrick Trustees giving rise to a new contract. Even if any breach of clause 18.1 was not waived simply by Mr Crocker having been a party to the tripartite agreement itself, I consider that it must have been waived in writing, to the extent that writing might have been required pursuant to clause 19.2, by him signing the share certificates in circumstances in which the transfer of the relevant shares and the novation of the 2010 SHA went hand-in-hand.

324. In short, as there has been an effective novation of the 2010 SHA so as to give rise to a new contractual relationship between Mr Crocker and the Fitzpatrick Trustees, it is, I find, open to the latter to rely upon the terms of the 2010 SHA.

OVERALL CONCLUSION

325. It follows from my finding that the 2014 Transfer was valid and effective, and is not liable to be impeached on the grounds of fraud or otherwise, and that there has been an effective novation in respect of the 2010 SHA such that the Fitzpatrick Trustees are now entitled to rely upon, and enforce its terms, that I consider that the Fitzpatrick Parties are entitled to the declaratory relief, essentially in the terms that they seek, and that the Counterclaim and Part 20 Claims seeking relief inconsistent therewith ought to be dismissed.

326. So far as the declaratory relief to be granted is concerned, my provisional view is that it ought to be limited to the declaratory relief referred to in paragraphs 59.1, 59.5A and 59.6 of the Amended Particulars of Claim, but I am prepared to hear further argument in respect thereof.

SCHEDULE A

RELEVANT PROVISIONS OF THE 2010 SHAREHOLDERS AGREEMENT

Clause 1.14 *'A reference to a party or the parties shall be a reference to either o both of JC and the Trustee of the Nisma Settlement and shall be deemed to include their respective successors in title unless the context otherwise specifically requires'*;

Clause 7.1 *'The parties hereto acknowledge that the Lease is and will continue to be the paramount asset of the JVC and essential to the future success of the Business';*

Clause 9.1 '*No party shall transfer, grant any security interest over, or otherwise dispose of or give any person any rights in or over any Share or interest in any Share unless it is permitted or required under the Articles or this agreement and carried out in accordance with the terms of this agreement'*;

Clause 9.2 *'A party may do anything prohibited by this clause 9 if the other party has consented to it in writing';*

Clause 13.1(a) '*Except for the provisions which this clause states shall continue in full force after termination, this agreement shall terminate: (a) when one party ceases to hold any Shares*';

Clause 15.1 - '*Each party shall, to the extent that it is able to do so, exercise all its voting rights and other powers in relation to the JVC to procure that the provisions of this agreement are properly and promptly observed and given full force and effect according to the spirit and intention of the agreement'*;

Clause 18.1 '*No person may assign, or grant any Encumbrance over or sub-contract or deal in any way with, any of its rights under this agreement or any document referred to in it without the prior written consent of all the parties (such consent not to be unreasonably conditioned, withheld or delayed)';*

Clause 19.1 '*A variation of this agreement shall be in writing and signed by or on behalf of all parties';*

Clause 19.2 '*A waiver of any right under this agreement is only effective if it is in writing and it applies only to the person to which the waiver is addressed and the circumstances for which it is given*';

Clause 19.6 *'Unless specifically provided otherwise, rights and remedies arising under this agreement are cumulative and do not exclude rights and remedies provided by law'*;

Clause 22.1 '*All transactions entered into between either party and the JVC shall be conducted in good faith and on the basis set out or referred to in this agreement or, if not provided for in this agreement, as may be agreed by the parties and, in the absence of such agreement, on an arm's length basis;*'

Clause 22.2 '*Each party shall at all times act in good faith towards the other and shall use all reasonable endeavours to ensure the agreement is observed'*;

Clause 22.3 '*Each party shall do all things necessary and desirable to give effect to the spirit and intention of this agreement*';

Clause 29.1 *'This agreement and any disputes or claims arising out of or in connection with its subject matter are governed by and construed in accordance with the law of England'*; and

Clause 29.2 '*The parties irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement'*.

SCHEDULE B

RELEVANT PROVISIONS OF THE 2010 ARTICLES

Article 5.3 Permitted transfers by family trusts

'Where any Ordinary Shares are held by trustees upon a Family Trust such Ordinary Shares may be transferred without restriction as to price or otherwise

(a) on any change of trustees, to the new trustees of that Family Trust, and

(b) at any time to the settlor or to another Family Trust of which he is the settlor or to any Privileged Relation of the settlor'[3];

Article 5.4 Transfers with Shareholder approval

'*Notwithstanding any other provision of these Articles, a transfer of any Ordinary Shares approved by the holders of a majority of the Ordinary Shares (excluding the proposed transferor) may be made without restriction as to price or otherwise and any such transfer shall be registered by the Board'*;

Article 6.1 Transfer Notices

'*A Seller shall, before transferring or agreeing to transfer all (but not any) Ordinary Shares held by him ("Sale Shares") or any beneficial interest therein, other than by way of a transfer in accordance with Article 5, give a Transfer Notice to the Company. Save as otherwise specifically referred to elsewhere in these Articles no such Transfer Notice may be served on or prior to 31 March 2012'*;

Article 6.2 Sale Price

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[3] The Interpretation provisions of Article 1 include definitions of '*Family Trust'* and '*Privileged Relations'* as follows:

> *'Family Trust: a trust which permits the settled property or the income from the settled property to be applied for the benefit of*
> - *the settlor and/or a Privileged Relation of that settlor, or*
> - *any charity or charities as default beneficiaries (meaning that such charity or charities have no immediate beneficial interest in any of the settled property or the income therefrom when the trust is created but may become so interested if there are no other beneficiaries from time to time except another such charity or charities),*
>
> *and under which no power of control is capable of being exercised over the votes of any Shares which are the subject of the trust by any person other than the trustees or the settlor or the Privileged Relations of the settlor. For purposes of this definition "settlor" includes a testator or an intestate in relation to a Family Trust arising respectively under a testamentary disposition or an intestacy of a deceased Shareholder;*
>
> *Privileged Relations: the spouse or widow or widower of a Shareholder und the Shareholder's children and grandchildren (including step and adopted children and their issue) and step and adopted children of the Shareholder's children'*

'Transfer Notices and Deemed Transfer Notices shall constitute the Company the Seller's agent for the sale of the Sale Shares in one or more lots at the discretion of the Board at, in the case of a Transfer Notice, the price specified by the Seller as the price at which he is willing to sell the Sale Shares and, in the case of a Deemed Transfer Notice, the price agreed between the Seller and the Board or, failing such agreement, within seven days of the date of the Deemed Transfer Notice, such price as may be certified in writing by the auditors for the lime being of the Company (acting as experts and not as arbitrators) to be in their opinion the fair market value of the Sale Shares having regard to the fair value of the net assets of the Company, including goodwill, and as between a willing vendor and a willing purchaser on the open market calculated as being that proportion of the fair market value of the total issued Ordinary Shares which the number of Sale Shares bears to the total number of Ordinary Shares The fees and expenses of the auditors in respect of such certificate shall be borne as to one half thereof by the Seller and as to the remaining half among the purchasers (if any) of the Sale Shares in proportion to the number of Sale Shares to be purchased by them respectively ("the Sale Price")';

Article 6.4 Offer to Shareholders

'Upon the Sale Shares becoming available they shall be offered for sale by the Company giving notice in writing to that effect to all Ordinary Shareholders (other than the Seller) as soon as it is practicable to do so The notice shall specify

(a) the number of Sale Shares on offer and the Sale Price, and

(b) the dale by which the application to purchase the Sale Shares has to be received by the Company (being a date no less than 10 Business Days and no more than 25 Business Days after the date of the notice)

The notice shall set out the method of allocation of the Sale Shares and shall invite each Shareholder (other than the Seller) to apply in writng to the Company for as many of the Sale Shares (if any) as that Shareholder would like to purchase';

Article 6.9 Effect of non-compliance

'*Any purported transfer of Shares otherwise than in accordance with the provisions of these Articles shall be void and have no effect*';

Article 6.10 Preference Shares

'*For the avoidance of doubt the foregoing provisions of Article 6 shall not apply to Preference Shares and a Preference Shareholder may only transfer Preference Shares with the prior written consent of all other Preference Shareholders';*